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(U.S.) Environmental Protection Agency, Washington, DC

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Office of Water
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Washington DC 20460

June 1978

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Report to Congress Waste Water Treatment Contracting and Bid Shopping

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The report was submitted to Congress by the United States Environmental Protection Agency (EPA) in accordance with the direction of the Joint House of Representatives - Senate conference Committee for amendments to the Federal Water Pollution Control Act. The study involved reviews of Federal, State, local and industry specification and bidding practices, analysis of substantial input from interested parties, review of ongoing EPA studies, discussion of the issues with the EPA Management Advisory Group (MAG), and the participation in joint meetings with groups representing consulting engineers, contractors and equipment suppliers. Based on the review and analysis of the comments and proposals offered regarding bid shopping, equipment listing and prequalification of major items of equipment, EPA recommended against any Federal direction in the form of legislation or regulation changes in this area. The report noted that EPA plans to review basic prequalification procedures to identify, for voluntary use, the necessary minimum elements for prequalification which would comply with the nonrestrictive specifications requirements for adequate competition.

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JUN 29 1978

THE ADMINISTRATOR

Honorable Walter F. Mondale
President of the Senate
Washington, D.C. 20510

Dear Mr. President:

I am pleased to submit herewith the United States Environmental Protection Agency Report to the Congress of the United States on Wastewater Treatment Contracting and Bid Shopping. This report is submitted in accordance with the direction of the Joint House of Representatives-Senate Conference Committee for amendments to the Federal Water Pollution Control Act. The direction of the Conference Committee is contained in the conference report accompanying H.R. 3199 in the section entitled "Water Treatment Contracting and Bid Shopping."

In that section, the conferees directed me to "review implementation of Section 204(a)(6) provisions to determine if any modification of regulation or law may be necessary or appropriate." In undertaking this review, I was to focus particularly upon whether or not principal subcontractors and equipment suppliers should be named in bid submissions for treatment works. I was also to review whether the requirements of 204(a)(6) have been interpreted as requiring low-dollar treatment equipment in practically all cases.

In our report, we have sought to define both the scope and context of these issues, particularly the extent to which suggested remedial actions could be utilized under the requirements of the Act and its implementing regulations; and the advisability of altering such policies if necessary. By presenting and considering the comments of other interested parties, the report reflects the full range of opinions available to the Agency during our deliberations.

As you will see, the report concluded that neither regulation changes nor further legislation are necessary or appropriate. The report spells out in detail the basis for this conclusion.

I trust that the report proves fully satisfactory to you and the committee. If such is not the case, or if you or any member have additional questions, please contact me.

Sincerely yours,

Barbara Blum

Barbara Blum
Acting Administrator

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JUN 29 1978

THE ADMINISTRATOR

Honorable Thomas P. O'Neill, Jr.
Speaker of the House of Representatives
Washington, D.C. 20515

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Barbara Blum

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Acting Administrator

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY REPORT TO THE CONGRESS OF THE UNITED STATES ON WASTEWATER TREATMENT CONTRACTING AND BID SHOPPING

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Executive Summary

This report to Congress is in response to direction from the Joint Conference Committee on the 1977 Amendments to the Federal Water Pollution Control Act. The conferees directed the Administrator to review the implementation of the Section 204 (a)(6) nonrestrictive specification provision enacted by Public Law 92-500 in 1972, to determine if any modification of regulation or law may be necessary or appropriate. The review was particularly focused to evaluate the emphasis on low-dollar treatment equipment and whether principal subcontractors and equipment suppliers should be named in bid submissions on construction grant projects to prevent bid shopping.

The study by EPA has involved reviews of specifications and bidding procedures at the Federal state and local levels, analysis of substantial input from various interested parties, review of ongoing EPA studies, and discussion of the issues with groups representing grantees, consulting engineers, contractors and equipment suppliers.

The nonrestrictive specification provision of Public Law 92-500 provides: "that no specifications for bids in connection with such works shall be written in such a manner as to contain proprietary, exclusionary, or discriminatory requirements other than those based upon performance, unless such requirements are necessary to test or demonstrate a specific thing or to provide for necessary interchangeability of parts and equipment, or at least two brand names of comparable quality or utility are listed and are followed by the words 'or equal'."

EPA's implementation of this provision interrelates these statutory nonrestrictive specification requirements with fundamental Federal requirements pertaining to competition and issuance of specifications. Cost effectiveness, including life cycle costs, was established as an acceptable procedure for determining performance in support of the use of restrictive specifications.

The nonrestrictive specification requirements encourage free and open competition among subtier bid items which meet the requirements of the project. This competition has fostered both technological development and a growing marketplace among subcontractors and suppliers. Such competition is appropriate for public contracting but can also be a factor in bid shopping. The possibility of bid shopping is affected by the parties involved in the competition, the timing as to when the competition takes place and the competitive procedures utilized. Bid shopping occurs when the prime contractor uses the lowest sub bid as leverage to achieve even lower bids from competing subcontractors. Competition appropriate for public contracting can also encourage the selection of subtier bid items which have a low first cost. Quality can be maintained, however, by rigid adherence to the specifications, the use of cost effectiveness and life cycle costing rather than first cost in the selection of items and through the process of carefully reviewing bid items proposed by the contractor for use in the project. The EPA and the grantee will be further assisted in assuring compliance with specification requirements through a program established by interagency agreement between EPA and the Corps of Engineers which will expand construction project inspection and monitoring.

The input to the study has indicated widely diversified opinions as to which are the best procedures to be followed for bidding on construction grant projects. Only the wastewater equipment manufacturers strongly support a mandatory requirement for naming or listing specific subtier items in the prime bids. The general contractors and other groups are opposed to such a requirement being mandated by law or Agency regulation. A few commentors could accept a listing requirement on a voluntary basis at the discretion of the grantee. A joint committee involving representatives of the consulting engineers, the equipment manufacturers, and the contractors jointly proposed that EPA identify an acceptable prequalification procedure that would meet the nonrestrictive specification requirements for competition and which could be utilized on a voluntary basis by grantees and their engineers to prequalify major items of equipment. In prequalification the engineer or the grantee or both review potential equipment items through a competitive process and establish a list of those which are acceptable for the project.

Current statutes and EPA regulations neither prohibit nor require naming or prequalifying of equipment suppliers in municipal contracting for construction grant projects. In accordance with EPA regulations on contracting, grantees may use their own procurement systems and procedures which meet state and local law provided minimum Federal requirements are met. This is consistent with the emphasis on increased state and local decision-making in the FWPCA and its implementing regulations, as well as OMB guidance on state and local assistance programs.

A review of ongoing EPA studies has indicated several which indirectly relate to this study. These deal with subjects such as factors affecting the performance and reliability of completed treatment facilities and the economics of the equipment industry. The preliminary results of these other studies are not inconsistent with the recommendations of this study. The preliminary results of the economic study which focuses on the views of the equipment industry, indicate many of the same contentions raised by the equipment industry in comments and recommendations furnished as input to this Congressionally directed study. Because of the mix of business from various sources, the economic verification of these contentions was not readily discernible. The preliminary recommendations of the economic study are for further review in this area.

An extensive body of state and local laws and regulations exists in the area of specification and bidding procedures for public contracts. These procedures can be applied to contracting under construction grants to the extent that they do not conflict with minimum Federal requirements. Some states and local governments have procedures which control bid shopping to varying degrees through a variety of mechanisms. The imposition of mandatory Federal requirements in this area would superimpose such requirements on state and local procedures and may conflict with state and local statutes or ordinances on bidding.

In accordance with construction grant requirements, the naming of innovative products and processes in the specification may be justified if required to demonstrate or test a specific thing or if found to be cost effective. In the 1977 Amendments to the Federal Water Pollution Control Act the use of innovative technologies is encouraged by allowing up to 15% higher life cycle costs in the cost effectiveness analysis of such technologies and by permitting the Federal grant participation for such technologies to be increased from 75% to 85% of the eligible costs. Modification or replacement grants are also allowed where the selected innovative technology fails to perform, as long as such failure is not based on negligence. The use of innovative technologies would normally be considered during project planning and design. However, the procedures developed to implement these provisions can be used for prequalification of items prior to bidding or during bidding provided the documents soliciting proposals clearly indicate the emphasis that will be placed on innovation and life cycle costs.

Based on the review and analysis of the comments and proposals offered regarding bid shopping, equipment listing and prequalification of major items of equipment, EPA recommends against any Federal direction in the form of legislation or regulation changes in this area. Aside from the technical considerations used in arriving at this recommendation, serious thought was given to the desirability of Federal intrusion into local bidding and contracting procedures where a significant body of state and local laws and regulations exists. Imposing Federal requirements in this area would be inconsistent with other goals to increase state and local responsibility and decision-making.

EPA intends to continue to permit the use of anti-bid shopping procedures including listing on construction grant projects where such procedures are established by state and local requirements or preference.

In order to permit the consulting engineer and the grantee to take a more active role in the selection of quality equipment items necessary for the successful operation of the completed facility, and still maintain the open competition appropriate for public procurements, EPA plans to review basic prequalification procedures to identify, for voluntary use, the necessary minimum elements for prequalification which would comply with the nonrestrictive specifications requirements for adequate competition.

I. Introduction

A. Purpose

This report is submitted to Congress by the United States Environmental Protection Agency (EPA) in accordance with the direction of the Joint House of Representatives - Senate Conference Committee for amendments to the Federal Water Pollution Control Act. The direction of the conferees is contained in the conference report accompanying H.R. 3199 in the section entitled "Water Treatment Contracting and Bid Shopping." This section, which can be found in the House of Representatives Report No. 95-830, 95th Congress, 1st Session, pages 113-4, are reproduced in Appendix A of this report. The amendments were signed by the President on December 27, 1977 and became Public Law 95-217.

B. Direction of the Conference Committee

The conferees directed the Administrator to review the implementation of the section 204(a)(6) provisions enacted by Public Law 92-500 in 1972 in order to determine if any modifications of regulation or law may be necessary or appropriate. The review was particularly focused to include an evaluation of whether principal subcontractors and equipment suppliers should be named in bid submissions for treatment works so as to prevent bid shopping. Also highlighted for review was the interpretation of section 204(a)(6) nonrestrictive specification provisions as requiring acceptance of low-dollar treatment equipment proposed for construction grant contracts.

C. Background

This section of the report provides a brief summary of background issues in order to set the stage for additional discussions. The items covered are discussed in more detail in subsequent portions of the report.

Section 204(a)(6) of Public Law 92-500 enacted in October 1972 provides that:

> "Section 204(a) Before approving grants for any project for any treatment works under section 201(g)(1) the Administrator shall determine -- ... (6) that no specification for bids in connection with such works shall be written in such a manner as to contain proprietary, exclusionary, or discriminatory requirements other than those based upon performance, unless such requirements are necessary to test or demonstrate a specific thing or to provide for necessary interchangeability of parts and equipment, or at least two brand names or trade names of comparable quality or utility are listed and are followed by the words 'or equal'."

This statutory provision, commonly referred to as the nonrestrictive specification requirements, was implemented in Agency regulations (40 CFR 35.936-13). These regulations interrelate the statutory nonrestrictive specification requirements with fundamental Federal requirements pertaining to competition and issuance of specifications. Additional program requirements were also furnished to the EPA regions. (Nonrestrictive Specifications, Program Guidance Memorandum PG-19A, issued August 8, 1975, later renumbered Program Requirement Memorandum PRM 75-5). The application of these nonrestrictive specification requirements emphasizes that maximum free and open competition must be maintained in the preparation of specifications on construction grant projects.

Under prior practices, the consulting engineer or the municipality had normally selected the items they considered acceptable in the design, and specified those items, sometimes by brand name. Some state and local procedures required the words "or equal" or "or approved equal" where brand names were used. But contractors were generally not encouraged to substitute items for those named. Under the new requirement most engineers have chosen to use "two brand names or equal" language in their specifications rather than to use performance specifications, or to use cost effectiveness analyses to demonstrate life cycle cost advantages in support of specifying a single item. Competition has improved and considerably more subtier items are entered in the competition under the new system. These items are frequently, but not always preapproved by the engineer prior to bid opening. Under many contracts "or equal" items can also be approved by the engineer or the grantee after contract award.

It is the contention of the equipment suppliers that regardless of these individual contract variations, a result of the new requirements in addition to increased competition, is that equipment items incorporated in treatment plant construction are now sometimes selected by the prime contractors based on low price, rather than by the consulting engineers based on prior experience, design preference, good start-up and post-construction services, or other intangible but equally important factors.

This is the type of situation which has caused the equipment suppliers to raise objections and suggest that prime bidders should be required to identify suppliers in their bids and not be allowed to easily substitute others after contract award. On the other hand the prime contractor must contend with bidding substantial sums of money based on numerous subtier proposals which may not have been received until the last minute, may not be finalized or binding on the supplier, may not meet the technical, timeliness or warrantee requirements of the specifications and may be completely different and not comparable with the other proposals being evaluated. More detailed discussions of the concerns of equipment suppliers and prime contractors, as well as those of grantees and engineers are provided in subsequent portions of this report.

In the development of regulations and guidance on bidding, EPA has taken the view that there is no compelling Federal interest in mandating specific bidding procedures, so long as the state and local practices utilized comply with the minimum Federal requirements identified in EPA regulations. Accordingly, EPA regulations in general neither prohibit nor require the types of procedures for inhibiting bid shopping that have been suggested by equipment suppliers. Provided that the minimum Federal requirements are met, state and local laws and procedures govern most questions which arise in the contracting process under the construction grants program. This is consistent with the program emphasis on increased state and local decision-making. State and local entities utilize a wide variety of contracting procedures, some which are consistent and some which are not consistent with the equipment suppliers' recommendations. This report indicates some of the wide divergence of opinion as to the best procedures for bidding on construction grant projects.

D. Definitions

There is no general agreement on a precise definition of "bid shopping." The differences in definition seem to be a question of when bid shopping occurs rather than what it entails. The Water and Wastewater Equipment Manufacturers Association, Inc. (WWEMA) state in a legal brief on the subject that bid shopping "refers to the prime contractor's shopping for a lower bid after the prime bids have been opened". (WWEMA Briefing, pg 3). The Comptroller General has identified bid shopping as the efforts of a prime contractor to reduce prices quoted by his subcontractors, by shopping that bid to other subs, but only after contract award. (See e.g. 43 Comptroller General 206(1963)). Bid shopping has also been defined by a Commission on Government Procurement, established by the Congress in 1969, as the prime contractor's use of the lowest subcontractor bid, at any time, as leverage to achieve a lower bid. For the purpose of this report bid shopping refers to any post bid-opening efforts by a prime contractor to use the lowest bid received on a subcontract as leverage to gain an even lower bid.

The terms "bid shopping" and "bid peddling" have sometimes been used interchangeably. However, bid peddling more precisely refers to post bid-opening action by subcontractors, to undercut a previously low bid by another subcontractor. This usually occurs in concert with bid shopping by a prime contractor. Accordingly, the term bid shopping as used in this report will also include the parallel practice of bid peddling to the extent that it occurs.

In the construction grants program "nonrestrictive specifications" are specifications which in accordance with Section 204(a)(6) of the Federal Water Pollution Control Act (FWPCA) do not contain "proprietary, exclusionary or discriminatory requirements other than those based on performance." The use of two brand names followed by the words "or equal" also complies with the nonrestrictive specifications requirements of the statute. It should be noted that restrictive specifications are permitted by the FWPCA under certain circumstances such as demonstration of a particular thing or interchangeability of parts.

"Prequalification" or "preapproval" of major equipment items refers to a procedure whereby the engineer or the municipality or both review potential equipment items through a competitive process and establish a list of those that are acceptable for the project. If prequalification is utilized, provisions must be made to assure that free and open competition is maintained in the prequalification process consistent with the FWPCA and its implementing regulations.

In the context of this report "naming" or "listing" refers to a requirement in the bidding documents that a prime contractor name a single subcontractor or supplier for certain items that are so specified. If established, a listing requirement must be clearly set forth in the invitation for bids. The actual listing requirement may take several forms. For example the prime bidder may select from a list of prequalified suppliers or under certain defined circumstances may propose an equivalent supplier. Prequalification and listing are discussed in more detail in subsequent portions of this report.

E. Scope of EPA Study

The conduct of the EPA study involved reviews of Federal, state, local and industry specification and bidding practices, analysis of substantial input from interested parties, review of ongoing EPA studies, discussion of the issues with the EPA Management Advisory Group (MAG), and the participation in joint meetings with groups representing consulting engineers, contractors and equipment suppliers.

Some groups and individuals submitted detailed recommendations on the bidding procedures in the EPA construction program. WWEMA submitted a legal brief in support of a regulatory listing requirement. The Associated General Contractors (AGC) submitted arguments opposing any listing requirements. In addition to the unsolicited inputs from various sources, comments and recommendations were requested from other interest groups, MAG members and Federal agencies. Since many of the basic procurement issues in the study involve question of law and legal interpretate the study was conducted in close coordination with the EPA Office of General Counsel. The ten EPA Regions were polled for input on current procedures and recommendations regarding the issues covered in the study. A list of groups contacted and those providing input to the study is included in Appendix B and copies of comments and recommendations submitted are included in Appendix C. Procurement procedures for both direct Federal procurement and Federal assistance programs were reviewed to determine specification and bidding practices in these areas. The statutes and regulations of several states were reviewed to identify contracting and bidding procedures at state and local levels.

In addition, EPA participated as an observer in a series of joint meetings with representatives from AGC, WWEMA and the American Consulting Engineering Council (ACEC). As a result of these meetings a better understanding of the concerns of the various groups and some joint recommendations, primarily in the area of prequalification, were developed. The recommendations are further discussed in Section III. E. of this report.

In the course of the study the comments and recommendations from the various interest groups were thoroughly reviewed and analyzed. The issues were identified, researched and analyzed, conclusions were reached and recommendations were formulated.

II. Current Practices

A. Federal Procurement

Extensive regulations and procedures exist in direct Federal procurement for specifications and bidding on Federal construction contracts. Construction contracts in Federal procurement like other contracts for public work are usually awarded based on formal advertisement and competitive bids. Every effort is made to foster maximum free and open competition which results in the lowest price to the Government and fair and reasonable compensation to the contractor. Proprietary or sole source specifications are ocasionally used where a particular item is required for a certain justifiable purpose.

In Federal procurement, obligations to list suppliers or inhibit bid shopping have not been recognized unless imposed by agency regulations and guidelines or statutes. However, despite the detailed consideration given to procurement procedures by the Federal Government, prequalification procedures and requirements for naming of suppliers, or other requirements inhibiting bid shopping are almost non-existent.

The Department of Interior dropped its listing requirements in 1975, shortly after losing a United States Court of Claims case involving the Department's refusal to allow a contractor to substitute another subcontractor for the listed subcontractor. (40 Federal Register 17848 (April 28, 1975) and 29722 (July 15, 1975)).

The General Service Administration (GSA), after publishing notice of its intent to delete the GSA requirement for prime bidders to list certain subcontractors in their bids, (42 Federal Register 27966 (June 1, 1977)) has apparently decided to maintain the listing requirement with some modifications. Under the GSA requirement, prime bidders must list subcontractors having a certain percentage of the work for heating, ventilation, and air conditioning (HVAC), electrical, vertical transportation (elevators/escalators) and other general categories of work in the specifications. The current regulation requires the listing of subcontractors when their work comprised more than 3.5% of the total. An increase in this percentage, possibly to 6% is one of the items being considered in the revisions and modifications to the GSA procedures.

Prequalification of equipment items is also generally not required or used in Federal contracting. The procurement of standard items is usually based on extensive systems of technical and performance specifications which exists in most direct Federal procurement programs. Specialized items necessary for a particular purpose are usually procured directly by the Government for installation by the contractor. Direct procurement by the Government usually involves some type of competition, even if the specialized item is available from limited sources. In the absence of technical or performance specifications and if time is of the essence, the Government may specify items by brand name followed by the words "or equal". This latter method is the least preferred method of Federal procurement.

B. Federal Assistance Programs

Specification and bidding procedures in Federal assistance programs are significantly more diversified than those involved in direct Federal procurement for a variety of reasons. First, statutory, regulatory and Federal agency requirements vary among the different programs. Also a variety of state and local requirements normally apply to the contracting efforts since these government entities are usually doing the contracting under assistance programs. Moreover, the programs themselves vary as to the type of assistance provided. Assistance can be in the form of grants, loans, loan guarantees, revenue sharing, or technical assistance. For the purpose of this report the discussion is limited to contracting under grants-in-aid to state and local governments, which is the type of assistance provided by the EPA construction grant program.

The one common element for procurements under grant programs is the application of Attachment O to OMB Circular A-102. ("Uniform Administrative Requirements for Grant-In-Aid to State and Local Governments" recently reissued at 42 Federal Register 45828-91, September 12, 1977) The purpose of Circular A-102 is to set broad uniform guidance for Federal grantor agencies to follow in their grant programs. Attachment O of the Circular, which deals specifically with procurement under grant programs, is currently under revision. In the area of bidding and specifications the revisions being considered do not significantly alter the existing Attachment O requirements. Under Attachment O, grantees may use their own procurement regulations which reflect applicable state and local laws, rules and regulations, provided that procurements made with Federal grant funds adhere to certain defined standards. There are no provisions in Attachment O requiring or prohibiting either prequalification or listing in contracting under grants. The provision of maximum open and free competition is emphasized, and specifications containing features which unduly restrict competition are not permitted. However, "brand name or equal" descriptions may be used to define the salient requirements of a procurement.

Attachment O provides broad guidelines upon which Federal grantor agencies are to base specific program requirements. Agencies are not to establish additional requirements unless required by Federal law or Executive Orders. Accordingly, state and local procurement procedures are used to a great extent in Federal grant programs and any prequalification procedures or listing requirements for bidding and contracting are imposed by the State or the local agencies who are recipients of the grant funds.

C. Construction Grant Program

The EPA construction grant program is a major Federal program established under the Federal Water Pollution Control Act (FWPCA) to provide grant assistance to local governments for the purpose of abating water pollution resulting from municipal wastewaters. The EPA construction grant subagreement regulations (40 CFR 35.936 through 35.938) indicate EPA requirements relating to procurement of engineering services and construction contracts under this program. Since Attachment O revisions were being considered when these subagreement regulations were developed, EPA was granted permission to deviate from the specific requirements of the existing Attachment O. In the construction contract bidding area there are no significant differences between the broad guidance of Attachment O and the requirements of the EPA regulations. Construction contracts are normally procured by formal advertisement and competitive bidding, using state and local procedures and the Federal requirements established to implement the provisions of the FWPCA.

EPA has not imposed any prequalification procedures, listing requirements, or anti-bid shopping requirements upon its grantees. Consistent with Attachment O, as well as the emphasis on increased state and local decision-making in the FWPCA and its implementing regulations, EPA does not prohibit grantees from establishing such requirements in their specification and bidding procedures provided minimum Federal requirements for adequate competition are met.

When properly imposed by the grantee, prequalification procedures, listing requirements and bid shopping prohibitions are enforceable under the EPA bid protest procedures described in EPA regulations at 40 CFR 35.939. This provision in the EPA regulations was established to clearly define expedient procedures for the equitable administrative resolution of disputes arising out of procurements under construction grant projects. The GAO has admonished Federal grantor agencies to provide for such procedures. Additionally, the establishment of such protest procedures is consistent with proposed revisions being considered for Attachment O, although not required under the existing Attachment O. In order for the grantee's procurement requirements regarding prequalification listing or anti-bid shopping to be upheld in protest under the EPA regulations, these requirements must not be contrary to the minimum Federal requirements for adequate competition and must be clearly identified and defined in the grantee's procurement procedures.

A poll of the ten EPA regions indicated that a variety of prequalification and listing procedures have been used in local government contracting under the construction grants program. The imposition of such procedures has depended upon the public contracting requirements of state and local statutes and regulations. These state and local requirements are discussed further in the following section of this report. Although no strong positions were taken, most regions indicated that prequalification procedures and to a lesser extent listing requirements could probably improve project performance and reduce delays, even considering the additional time that might be required for such procedures. However, only one response suggested that these procedures should be mandatorily required by regulation. The majority position was that the use of these procedures should continue to be permitted as they currently are under the existing regulations with a possible clarification which would clearly indicate the acceptability of such procedures in the construction grant program.

D. State and Local Statutes and Procedures

An extensive body of state and local laws and regulations exists which deal with specification and bidding procedures in public contracts. Grantees may use these procedures for contracting under construction grant projects to the extent that they do not conflict with the minimum requirements of the EPA construction grant regulations.

Some of these state statutes have provisions dealing with bid shopping and in accordance with EPA regulations are applicable to construction contracting under the construction grant program. Several of these statutes were reviewed in the course of the study.

Although these statutes vary widely in both form and content, they can be grouped into three general categories: Subcontractor listing requirements, subcontractor filing requirements, and multiple prime contractor bidding.

Subcontractor listing is the best known and most widely used approach to solving bid shopping problems. Under this method of bidding the general contractors are required to list proposed subcontractors by name in their bids and are not allowed to make substitutions without demonstrated justification and the consent of the contracting authority. When this requirement is employed, any subcontractors who will perform more than the stated minimum percentage or dollar amount of the total job must be listed by the general contractor in his bid (e.g., in California, any subcontractor who will perform more than ½ of 1% of the total amount bid must be listed). Instead of determining applicability by percentages or dollar amounts some states required the general contractors to list subcontractors who will perform certain specialty work, (e.g., mechanical, electrical, plumbing, heating and ventilation).

There are some weaknesses in this method of controlling bid shopping. First, because of time constraints the general contractor may be required to list a subcontractor without having fully evaluated the subtier bid proposals. Second, there is no legally binding contract between the proposed subcontractor and general contractor prior to the award of the prime contract. This allows the listed subcontractor to restrict the scope of work or to seek additional compensation prior to entering into the subcontract. Finally, since general contractors are not required to list subcontractors for those portions of specialty items of the job which they will perform themselves, the listing requirement can be circumvented by a general contractor who does not list subcontractors and "shops" for the best price from a subcontractor who is then retained as an employee of the general contractor.

The second category of anti-bid shopping statutes, subcontractor filing requirements, is used primarily in Massachusetts. Under this method, the specifications for a particular job contain separate sections for various classes of work for which the awarding authority deems it necessary to review sub-bids. Subcontractors then file their bids for the various classes before the general bids are received. The prospective general contractors select among the prequalified subcontractors and name those whom they intend to use for the job in their bids. After being awarded the contract the general contractor cannot substitute subcontractors without obtaining the approval of the awarding authority.

The third system employed to protect subcontractors from bid shopping is the multiple prime contractor bidding method. Statutes which require this method of bidding generally provide for the total job to be split into subparts and contracts awarded for each segment of the job. An example of this method is that employed in New York where separate bids are received for the plumbing, heating and ventilation, electrical, and mechanical portions of the work. A variation to this method is employed in New Jersey where bids are received for the total job and individual segments of the job. The contract is awarded to the lowest bidder for each segment or lowest total bidder if his bid is less than the total of the low bids on the segments.

This method reduces the opportunity for bid shopping by elevating firms who would normally be subcontractors to the status of prime contractors. However, bid shopping below the prime contractor level is not eliminated or affected. The major criticism of this system is the increased cost of project administration. A project management firm must generally be hired to coordinate the work of the different segments.

The American Bar Association (ABA) is presently developing a Model Procurement Code for State and Local Governments which contains two provisions of interest to this study. The current draft of the Code includes a provision which would allow prequalification of potential suppliers of services, supplies, and construction. The purpose of this prequalification provision is to reduce the administrative burden of making numerous responsibility determinations during bidding. Under the provision as currently drafted, a prequalified supplier could be found nonresponsible after bid opening, or a supplier who was not prequalified could be found responsible. Therefore, such a prequalification provision does not preclude a subsequent evaluation of responsibility which could add or delete suppliers. The subsequent addition or deletion of suppliers after prequalification could result in protests and other bidding delays.

Another provision in the current draft of the Code deals with a qualified products list. Under this provision, if time does not permit post award testing, a specification could include or reference an appropriate qualified products list. Preparation of the qualified products list would require adequate public notice and competition. This provision recognizes the benefits that can be gained in public contracting through a competitive prequalification process. While it is doubtful that an up-to-date qualified products list could be maintained for the constantly changing variety of equipment items in the wastewater treatment industry, certain major items of equipment could be prequalified for individual projects.

Although a few jurisdictions are using draft provisions of the Model Procurement Code, it should be recognized that even after finalization and endorsement of the code by the ABA it will be some time before a significant number of local governments have adopted it.

III. Summary of Comments and Recommendations

A. The Water and Wastewater Equipment Manufacturers Association (WWEMA) Proposal

WWEMA submitted excerpts of a brief to the Administrator by letter dated December 2, 1977, and later furnished the entire brief. (See Appendix C). The essential position of WWEMA is that bid shopping/peddling is detrimental to EPA, its grantees and the public interest. WWEMA submits that these practices must be controlled through Federally imposed listing requirements. Grantees would impose the actual sanctions for any failure of a prime level bidder to conform to the requirements. The sanctions would include automatic disqualification of a nonconforming bid as nonresponsive and contract termination or monetary penalities (20% of the relevant subcontract price is suggested) for unauthorized substitution.

WWEMA presents a number of arguments on behalf of their position. Briefly summarized, these arguments include:

1. Bid shopping is unethical. The ability to shop after bid opening "rewards the ruthless and unethical prime and discourages responsible conduct on the part of the subcontractor." The low bidding prime contractor subverts the competitive process by having "a chance" to receive a lower bid, without a concomitant price decrease to EPA or the grantee. The subcontractor is forced to perform at a loss or "is tempted to unethical conduct in the form of doing an inadequate job." (WWEMA Brief, pp 4-6, 9 and 12)

2. Bid shopping adversely impacts competition from subcontractors.

The risk and loss involved in bidding on an EPA assisted project are accelerated. Subcontractors are entirely without recourse to bid shopping by the prime contractor with the low bid. Contract performance is often only minimally profitable, at best. Subcontractors may refuse to bid to "known" bid shoppers or pad their initial offers, in expectation of later shopping. (WWEMA Brief, pg. 8 and 9).

3. Bid shopping results in inflated contract prices. If subcontractors pad their bids, only the prime level bidder obtains the benefits of subsequent price reductions resulting from bid shopping. Accordingly, the prime bid is artificially high. Even if the prime lowers his bid in anticipation of being able to bid shop, the risk involved in not knowing how much reduction can be achieved adds some cost to the bid.

4. Bid shopping discourages research and development by equipment suppliers.

Bid shopping reduces profits to waste treatment equipment suppliers thereby eliminating the justification for research and development expenses. This is detrimental to the long-range goals of cleaning up the Nation's water because new and innovation technologies will not be developed by private enterprise if it is not profitable. (WWEMA Brief, pp 10-11).

5. Bid shopping may lead to delays in the ordering of equipment.

If bid shopping is allowed, a subcontractor will not order equipment until a firm subcontract is finally negotiated, which may cause substantial delays. (WWEMA Brief, pg 11).

WWEMA suggests that EPA impose a listing requirement and bid shopping prohibition through a formal rulemaking. The regulation suggested by WWEMA would apply to any contract having an estimated total cost in excess of $150,000. Under this regulation an EPA grantee would have several tasks. First, each Invitation For Bid (IFB) must contain the listing requirement set forth in the regulation. Second, the grantee through its consultant must determine the subtier categories of work for which listing is required. WWEMA suggests application of listing requirements to categories exceeding 3% of the estimated prime contract cost. Third, the grantee would review requests for substitutions and hold hearings, at the request of the affected subcontractors. Fourth, the grantee may terminate a prime's contract or impose a sizeable penalty (20% of the original subcontract price) for an unauthorized subtier substitution. (WWEMA Brief, Appendix I).

EPA also has some responsibilities under the WWEMA proposal. First, the Agency must determine that each grantee has included the regulatory clause in its IFB. Second, the Agency must determine that the specifications include the appropriate listing form. Third, the Agency may be called upon to determine some bid protests regarding the listing requirement. According to WWEMA, these would be limited to instances where the proposed contractor failed to complete the form, the grantee failed to include the proper forms, or the prime challenges the categorization of subcontract work. WWEMA contends "that no new grounds for protest are provided under the proposed regulation." (WWEMA Brief, pg. 17).

B. The Associated General Contractors (AGC) Position

By letter of January 31, 1978, the AGC submitted its comments to the Administrator on the issues identified in the Congressional Conference Committee Report and the WWEMA brief. (See Appendix C for the AGC submittal). Aside from complete opposition to the WWEMA proposal, the AGC comments are of particular interest with respect to its assessment of the problem. AGC contends that no bid shopping "problem" exists in the procurement of equipment under EPA construction grants. Instead it is the bidding practices of equipment suppliers which are responsible for the confusion, the lack of commitment by prime contractors and the subsequent need for negotiations complained of by WWEMA. A clear summary of these AGC conclusions is provided at the beginning of the AGC comments:

> "It is the view of the Associated General Contractors of America (hereafter AGC) that the listing of principal subcontractors and equipment suppliers by bidders for EPA grantee construction contracts will not serve a useful purpose, but would only serve the economic self-interest of suppliers in the negotiation of purchase orders. AGC submits that a bid shopping problem does not exist in the market for manufactured water treatment equipment. To the contrary the major problems present in this field today result from the failures of the equipment manufacturers to substantially meet their responsibilities in the market-place." (AGC Comments, pg 1).

AGC presents a number of arguments in opposition to a listing requirement. Briefly summarized these arguments include:

1. Equipment Suppliers Bidding Methodology Necessitates Subsequent Negotiations. The primary element of AGC's concern is the manner in which bids are compiled. AGC's contention is that normal bidding practice among equipment suppliers does not provide for assurances that offered equipment will conform to the specifications of the grantee. Additionally, prices may not be given to the general contractor until a few hours prior to submission of the prime level bid, with frequent telephonic negotiations. The conclusion of this process is a "gamble," in AGC's words:

> "The methods used by equipment suppliers in submitting quotations to prospective prime contractors under the EPA construction program is chaotic. It is a normal pattern of conduct for the manufacturer to offer a product that it will not assure is in compliance with the owner's plans and specifications. Moreover, the manufacturer will not identify, with specificity, the aspects of the equipment that do not meet the owner's requirements. It is then left to the general contractor to make these determinations. Magnifying the burden imposed on the general contractor, the equipment manufacturers normally do not provide prices covering their proposals until short hours before the bid opening. Even when prices are

> furnished, usually 10 to 12 hours before bid opening, they are not firm and salesmen for the suppliers continue to telephone price reductions, frequently reaching 40 to 60 percent of the original price quotation, immediately prior to bid opening. By that time, it is impossible for the general contractor-bidder or his subcontractors to meaningfully evaluate quotations for the equipment. Instead, the generally contractor must gamble with the equipment prices to be included in its bid." (AGC Comments, pg 2)

The AGC comments include examples of "typical proposals" received by prime bidders. Based on these typical proposals, AGC argues that the prime bidder must assume a number of key burdens: (a) estimate a price; (b) make basic technical evaluation of the equipment to determine its compliance with specifications; and (c) check all exceptions to proposals to determine that all tie-in work or interfacing is covered by the estimate. Most importantly, notes AGC, these types of bidding procedures:

> "effectively prevented the finalization of any prospective purchase orders before prime contract bidding. The result had to be negotiations following bid opening. If not successful with these negotiations, the contractor must then go to another manufacturer." (AGC Comments, pg 14).

AGC does not make an argument in favor of the concept of bid shopping (which it deems an unwholesome practice, as indicated in the AGC Code of Ethics). AGC asserts that "post bid-opening negotiations, "would not be necessary:

> "if the manufacturers would offer equipment meeting the owner's plans and specification, and if the manufacturers would provide their price quotations to prospective contractors so that an effective evaluation and negotiation of work scope could be performed before bid opening." (AGC Comments, pg 14).

The equipment suppliers listing requirement proposed by WWEMA would, in AGC's opinion,

> "'lock-in' the general contractor to a single supplier, who could, after bid opening, demand whatever price it desired to bring its non-conforming proposal into compliance with the owner's specifications." (AGC Comments, pg 14).

2. The WWEMA proposal is administratively unworkable. AGC highlights the following problems it perceives if EPA adopted the WWEMA proposal: (a) administrative burden on EPA and grantees to promulgate and implement new regulations; (b) strain on grantee resources, and project efficiency, because of the need to conduct preaward evaluations

of contractors' lists, and review and act upon substitution request; (c) administrative bid protest would drastically increase because of questions of bidder responsiveness under a listing requirement (AGC presents ten basic issues from GAO protest cases where questions could arise and argues that otherwise responsive low bidders may be discarded resulting in higher contract costs); and, (d) contract claims and litigation will ensue, primarily as a result of decisions on substitutions. (AGC Comments, pp 14-18).

3. No Federal agency requires the listing of equipment suppliers bids. The GSA requirement concerns the listing of certain principal subcontractors but does not extend this requirement to suppliers of equipment under prime contracts or to suppliers under subcontracts. (AGC Comments, pp 18-19).

4. No Federal/local government intervention in these commercial relationships is appropriate. AGC makes two basic points in this regard. First that general contractors:

> "have historically demonstrated their ability to manage their own subcontractor and supplier relationships, and the imposition of added governmental interference in that relationship can only serve to frustrate that demonstrated ability." (AGC Comments, pg 19).

Second, that governmental regulations and decision-making is inappropriate, as a general rule, in this area which so closely involves basic questions of business and professional judgement.

C. Other Comments on the WWEMA Proposal.

The following comments are representative of those received by EPA on the WWEMA proposals. These comments were received as a result of discussion of the WWEMA proposal with the EPA Management Advisory Group (MAG) and a request for comments on the proposal. It is interesting to note that other than WWEMA members, all responses except one were opposed to the mandatory listing requirement proposed by WWEMA. The one response from a consulting engineer that was not opposed was more ambivalent than supportive and also suggested some changes to the WWEMA proposal. (See Appendix C for copies of actual responses).

1. Comments were received from Bart T. Lynam, General Superintendent of the Metropolitan Sanitary District of Greater Chicago (MSDGC), by letter, dated January 6, 1978. Mr. Lynam, upon review of the WWEMA brief, offers the following recommendations:

> "The proposal for a regulation mandating identification of subcontractors in bid documents for contracts funded by the U.S. EPA should be rejected. However, we feel that grantees should be allowed the option of including such requirements in their bid documents in whatever manner they deem necessary to either comply with State and local requirements or to mitigate potential effects of bid shopping and bid peddling on bid prices for such contracts."

The basis for Mr. Lynam's recommendations includes his observations and comments in the following areas:

a. Bidding methodology. In this respect, Mr. Lynam independently concurs with the position of AGC that post-bid opening negotiations are vital due to the inability of the general contractor to determine either an accurate price or conformance of listed equipment to the specifications during the bid preparation period:

> "Experience shows that submittals of bids by subcontractors generally occurs a very short time before the bid opening. Prime contractors are forced to accept bids at the last moment with little or no opportunity to determine if the low bidder fully understands the requirements of the contract documents or if the equipment to be provided meets the specification. Given this situation, it is difficult to see how primes can obtain better competitive subcontract bids before bid opening by the application of the proposed regulation."

b. Lower prices. Mr. Lynam points out that the WWEMA proposal does not prohibit or restrict "puffing" by subtier offerors. The essential argument is that any purportedly excess profits would merely be shifted from the prime to the subcontract level, and not result in lower bid prices.

c. Quality control. Mr. Lynam suggests that the desire to reduce costs and increase profits is universal, as is a grantee's concern that such efforts do not impair adequate performance. Accordingly, bid shopping can have little effect on job quality, if the grantee and the consulting engineer are vigilant in preventing completion of work which fails to conform to the specifications:

> "A major portion of the construction residency manpower and expense is directed towards prevention of detrimental shortcuts, improper procedures, inferior or non-specification materials, and other items which would produce an inferior project. If this were not the case, then the argument that bid shopping can result in shoddy work may be valid. Equipment or installations performed under a "no bid shopping regulation" will not provide guarantees for the grantee or the U.S. EPA of the quality of work to be performed or the material to be supplied. The only such guarantee is a rigorous inspection of work and assurance of complete adherence to the specification for materials and equipment."

d. Potential delays. Administrative burdens and inefficiencies are additional factors in Mr. Lynam's recommendation against the WWEMA proposal:

> "One other factor which influences my opposition to the WWEMA proposal is the potential delays associated with awards of contract under such constraints. Prior to formal award of a contract, all subcontractors and equipment to be provided would have to be reviewed for acceptability. It would appear that the refusal to accept a subcontractor or equipment submittal could result in a withdrawal of bid by the prime contractor or at least delays in obtaining an acceptable substitute. If one assumes that the unacceptability occurred because of a non-specification subcontract bid, it must be assumed that a substitute would result in a cost increase to the prime contractor. Would the grantee then be required to escalate the prime's bid by that additional cost?"

Mr. Lynam also highlights the inevitable delays attributable to protest, other disputes and litigation as important factors in this regard.

e. Present EPA grantee practice. Mr. Lynam expresses concern that the WWEMA proposal will eliminate the flexibility necessary for a grantee to determine the manner in which conformance with the specifications will be made, with no increase in the bid price:

> "Under most contracts administered by the District today, subcontractors need not be identified until formal award of the contract has been made. Subcontractor must then be approved as the work progresses. If a subcontractor is found unacceptable to the District, the contractor is forced to provide a substitute, acceptable to the District, within the bid price. Likewise, equipment submittals must meet specifications or a substitute provided at no additional cost. The leverage which the District has after award of the contract is significantly greater than that which would exist if such determination were made prior to formal award."
>
> "I am aware that a number of AMSA" (Association of Metropolitan Sewer Agencies)" members require submittal of subcontractors and equipment suppliers with the bid. In some circumstances, this District may find it to be advantageous also. In fact, such a requirement is placed on prime contractors to identify minority and small business contractors and the dollar value of the work to be subcontracted to each with the initial bid documents. This requirement is intended to assure compliance with the District's Affirmative Action Program in determination of the lowest responsible bidder. The excercise of such an option does, in my opinion, provide ample opportunity for flexibility by grantees in determining the mechanisms they will utilize in obtaining bids for their projects."

2. Comments on the WWEMA listing proposal were received in a letter, dated January 15, 1988, from Charles W. Carry, Assistant Director, Department of Technical Services, County Sanitation Districts of Los Angeles County, transmitting a memorandum from Vince DePalma, Assistant Office Engineer. Those comments, due to their succinct summation of concerns, are fully set out below:

> "The Districts are required by State Law to have the contractor list on his bid proposal form, all subcontractors who will perform work which has a value in excess of ½ of 1 percent of the project cost. A subcontractor is defined as a contractor who contracts directly with the prime contractor and who supplies material and labor at the project site. In California the statutory requirements for substitution of subcontractors closely parallel the requirements set forth in the proposed regulation.
>
> We do not feel the need for any additional regulations in the area of listing of subcontractors or equipment suppliers and, in fact believe that such a regulation could be, at times, counter-productive. Some of the reasons for this are as follows:
>
> 1. Such a regulation would cause the bid form to be very lengthy. In the pre-bid rush to complete the form properly, while receiving last-minute sub-bids, the contractor would be exposed to a very high risk of a costly error.
>
> 2. A mistake or omission on the form would result in the bid being declared non-responsive. Should a low bid be declared non-responsive, the agency can either award to the 2nd low bidder, assuming his bid is in order, or reject all bids and readvertise. The former alternative certainly results in higher costs, the latter often has the same result, not to mention increased administrative costs.
>
> 3. The proposed regulation closely parallels California Statute regarding listing of subcontractors (not including material and equipment suppliers); however, there are significant differences in the area of substitution of subcontractors. This would make such a substitution by a California agency confusing, at best.
>
> 4. The proposed penalty for substitution without approval, even if legal, would force the prime contractor on most construction contracts deeply into the red and cause him to either finish the contract while trying to minimize his losses or to default. Neither alternative is especially appealing for most agencies.

> 5. The regulation could be circumvented in the area of material and equipment suppliers by the contractor intentionally listing material or equipment which does not meet specifications. When his bid is acceptable and he is informed that he must supply specified material or equipment, he is free to shop.
>
> In summary it is our recommendation that control of bid shopping and peddling be left to the local agencies."

3. Comments on the WWEMA listing proposal were received from Billy T. Sumner, Partner in Barge, Waggoner, Sumner and Cannon, Engineers and Planners, by letter dated January 16, 1978. Mr. Sumner acknowledged that if listing were established, preapproval of equipment would probably be required in order to protect the prime contractor. While he sympathized with the problem being addressed, Mr. Sumner believed that the WWEMA proposal would be unworkable in practice. Specific areas of concern mentioned include:

a. Categorization of subcontractor work. Mr. Sumner indicated that it would be unwise for the consulting engineers or the grantee to separate the work into subcontract items, and dictate these to the prime contractor who is normally the expert in this area:

> "Specifications cannot always be written to completely segregate and categorize each and every type of work that might be subcontracted. It would be risky to start breaking down the contract documents into portions that apply vis-a-vis those that do not apply to a given operation. A threshold of three percent is too low."
>
> "Most engineers would need counsel of general contractors to completely categorize all work."

b. Twenty percent for unapproved substitutions. Mr. Sumner questions the legality of "a pre-set penalty without reference to actual damage."

c. Relationship between the grantee and the sub. Mr. Sumner also questions the direct relationship between the owner and the sub during the substitution hearing process proposed by WWEMA.

4. Comments on the WWEMA listing proposal were received from E.J. Peltier, Consultant with Sverdrup and Parcel, Associates Inc., Engineers and Architects. Except for problems with the dollar amount and percentage for applicability and the penalty clause, Mr. Peltier did not see anything "too drastic" in the WWEMA proposal. Mr. Peltier also furnished an example of listing on a Metropolitan St. Louis Sewer District Project.

5. Comments were received from Dr. William J. Katz, Director of Technical Services, Metropolitan Sewerage District of the County of Milwaukee, by letter dated January 20, 1978. Dr. Katz agreed on the need to more adequately formalize subcontractor selection. He described use of a "construction management system" whereby the grantee directly acquires the major components of the project for installation by the contractor. The WWEMA proposal was not specifically addressed except for the general comment that it has "the potential to decrease the frequency and magnitude of the incidents" (i.e., subcontract bidding problems).

D. General Comments

General comments and recommendation to EPA on specification bidding procedures resulted primarily from a direct questionnaire request to other Government departments and agencies and interested groups involved with the construction grants program. (See Appendix B for a list of commentors and Appendix C for copies of actual responses). The input from other Government entities was utilized in the preparation of Section II of the report dealing with Current Practices and is not repeated here. The following summaries are representative of general comments received:

1. The Association of Metropolitan Sewer Agencies (AMSA) whose members are comprised of relatively large metropolitan sewer agencies responded to the EPA questionnaire by letter dated March 13, 1978. EPA had already received responses from several AMSA members with specific comments on the WWEMA proposal. Some of these comments were discussed in the previous section of this report.

AMSA is opposed to the imposition of mandatory prequalification or listing requirements but could accept provisions permitting prequalification or listing to be utilized by grantees on a case-by-case basis. AMSA points out that in some cases, prequalification might be construed as price fixing. AMSA further recommends that the nonrestrictive specifications requirements of EPA regulations be modified to allow three or four models or types of equipment to be specified and eliminate the "or equal" terminology.

2. The EPA Management Advisory Group (MAG) has discussed construction grant bidding and specification procedures on several occasions. The MAG is comprised of individuals who have special expertise in various aspects of wastewater treatment, environmental concerns and public participation and who are appointed by the Administrator to advise the Agency on matters involving the construction grants program. Although many MAG members responded as individuals to our request for comments on the WWEMA proposal, the MAG has not as a group taken a position or provided recommendations to EPA on the bid shopping issue in the construction grant program.

A MAG subcommittee on bidding has, however, developed a subcommittee report which identifies some bidding procedure issues and suggests general solutions and specific recommendations in this area. The subcommittee report has not been formally adopted by the MAG. The report deserves mention however because it is indicative of the diversity of opinion as to the best procedures to be followed. Prequalification is indicated in the report as unworkable because of the time and expense involved:

> "There have been suggestions that all equipment of all manufacturers desiring to submit bids to be checked by the owner's engineer prior to the bid date. This suggestion is without merit as the cost to the owner and taxpayer cannot be justified. Much satisfactory equipment would necessarily have to be checked for compliance with the probable result that it would never be selected as the lowest and best bid item by the contractor. Because of design changes occurring almost constantly, no blanket approval ought to be given even to manufacturers who have an established reputation for excellent performance. Present procedure of checking the design and details of the apparent low bidder is the most cost-effective means of handling this item of work. The delay that would be occasioned by such preliminary review of all equipment is also not acceptable."

A specific recommendation of the MAG subcommittee report is that listing requirements be left to the grantee's discretion:

> "Allow the grantee, at his discretion, to require general contractor to include in his bid the identification of all major subcontractors and major equipment suppliers. Restrict all deviations or changes except where they are shown to be, without question, in the owner's or public interest."

Such a listing requirement would seem to require some form of prequalification to assure that the items would be acceptable for the project. Also as explained previously prequalification and listing are not prohibited by current EPA regulations or program requirements and can be instituted by any grantee who so desires.

The additional MAG subcommittee recommendation is noteworthy in that is suggests that provision be made for new equipment manufacturers' entry into the market:

> "In order to provide entry into the market by new equipment manufacturers, permit the contractor to name any major manufacturer's equipment as a deductible alternative if he first designates an approved or named item of equipment as his base bid. Determination of the low bid shall be based on the base bid."

3. The National Clay Pipe Institute (NCPI) provided comments and recommendations primarily with regard to the nonrestrictive specifications requirements, by letter dated March 1, 1978. The main thrust of the NCPI recommendations is that EPA withdraw from being involved in contracting and bidding procedures which they consider to be a state and local matter. The NCPI response references the uniform guidance for procurements under Federal grant programs found in Attachment O to OMB Circular A-102 and in accordance with that guidance recommends that more responsibility be delegated to state and local governments. The NCPI also suggests that section 204(a)(6) of the FWPCA be amended by adding the following language to the existing provision:

> "provided, however, that a State agency which has been or may be delegated authority by the Administrator to review plans and specifications under Section 203(a) and which considers that the State laws which govern municipal procurement operate substantially to provide the same protection as provided by the limitations of this paragraph may request the Administrator to approve, and the Administrator, if he agrees, shall approve the State system of procurement as used by municipalities in such State."

EPA has a regulatory provision similar to this at 40 CFR 35.936-21. Under this regulatory provision the Administrator may certify state or local procurement systems for use in lieu of EPA procurement procedures if the state and local procedures provide the same protection as the EPA requirements. Compliance with Federal statutory provisions is required for approval of a state or local procurements system and certification does not release the grantee from compliance with statutory requirements. The suggestion by the NCPI unlike the EPA regulation, would permit deviation from statutory provisions of the FWPCA.

4. Comments were received from the American Concrete Pipe Association (ACPA) by letters dated December 14, 1977 and January 27, 1978. The ACPA correspondence supports the existing regulation (40 CFR 35.936-13(a)) which permits the selection of a single pipe material for a particular project. ACPA recommends that procedures permitting such selection not be modified as a result of the EPA study.

E. Recommendations of the Joint ACEC/WWEMA/AGC Committee

A joint committee with representation from American Consulting Engineer Council), WWEMA and AGC was established during the Spring of 1977 to discuss bidding procedures under the EPA construction grants program. The purpose of the committee was joint resolution of issues of mutual concern regarding bidding procedures, and the formulation of recommendations to EPA where the committee felt improvements were possible.

EPA was invited to participate in the four committee meetings which were held over the past year. The EPA position and participation at these meetings has essentially been as a neutral observer, with the understanding that the Agency would welcome suggestions for improvements that the group as a whole could agree upon.

A summary of the position of the three groups involved with the joint committee follows:

1. ACEC could support procedures permitting prequalification of major items of equipment provided the engineer's fee reflected the additional engineering work required by the prequalification process.

2. WWEMA strongly supported prequalification of equipment ahead of bidding and naming of specific equipment items by prime contractors in their bids.

3. AGC supported procedures which would permit prequalification for major items of equipment, but was strongly opposed to any listing or naming requirements.

The committee in its meeting on February 3, 1977, adopted a joint proposal on prequalification of equipment. (See Appendix C) The proposal was offered to correct certain construction bidding problems perceived by the committee. These concerns are expressed in the proposal adopted by the committee:

> "The objectives of the Federal Water Pollution Control Act are in jeopardy because of the price-dominated marketing climate that has been prompted by EPA regulations covering purchase of equipment for wastewater treatment plants. Because of poor equipment, some plants do not function as designed. Once the equipment has been delivered, there is little incentive for the manufacturer to assist in making it work.
>
> Since initial cost is the dominant factor in determining the equipment that will be purchased for the next project, there is little reason for an equipment manufacturer to provide either design assistance or operation and maintenance support. This assistance is essential both during the design of the facilities and when the plant is placed in operation."

The Joint Committee further documented the essential concerns of each party in this regard (underlining added):

> "From the Contractor's viewpoint, the inability to determine whether an equipment manufacturer's offering will meet the specifications is a serious shortcoming. Contractors must evaluate a multitude of proposals in a very short period. In addition, many Contractors do not have a staff that is technically qualified to evaluate the equipment manufacturer's offering to determine whether it is equivalent to the equipment required by the specifications.
>
> From the Owner's view, it is important to obtain high-quality equipment that will perform the function required for many years in the future. Minimum maintenance and long life are two characteristics that are particularly difficult to obtain and evaluate when first cost is the dominant selection factor. For some items of process equipment, the function may be difficult and expensive and should be completed before the manufacturer starts manufacture of the equipment required for a particular project. Life cycle costs and energy consumption must be evaluated as well as first cost.
>
> From the Engineer's viewpoint, the review and evaluation of equipment must be performed at some stage in the project. If a prequalification approach is used, the Engineer's evaluation is performed early and the Engineer can be sure that equipment purchased meets the criteria established for the project. However, when prequalification is employed, additional engineering effort will be required to evaluate multiple proposals of equipment Manufacturers which must be reflected in the Consulting Engineers fee structure.
>
> From the Equipment Manufacturer's and the Contractor's viewpoint, the ability to obtain an advance determination of whether equipment is acceptable eliminates an element of uncertainty, and makes it possible to bid knowing who the competitors will be. Prequalification provides an opportunity for the equipment manufacturer to have his product thoroughly evaluated without the pressure to award a contract. An Equipment Manufacturer who failed to submit his equipment for evaluation during prequalification would be precluded from consideration at the time a contract was awarded."

The proposal adopted by the joint committee reflect their common support of procedures which permit prequalification of major items of equipment:

> "Prequalification of major items of equipment can provide significant improvement in the quality of equipment and ability of treatment plants to function as designed while retaining the competition that is mandated by P.L. 92-500."

It should be noted that nothing in existing EPA regulation or program requirements prohibit prequalification or listing procedures. Both in fact, are used by grantees in the construction grant program to varying degrees based on state and local statutes and procedures.

Basically, the committee recommends that EPA identify procedures which could be used by grantees and their engineers at their discretion for prequalification of major items of equipment:

> "It is recommended, therefore, that EPA revise the wording of PG-19A to permit use of an agreed-upon prequalification procedure for wastewater treatment equipment. The requirement for inclusion of the criteria he (the engineer) will use in evaluating (Page 2 of PG-19A) can be retained in the prequalification documents. It is further recommended that the term "or equal" not be imposed as a requirement in the bid specifications for the project when a proper prequalification procedure has been employed."

The joint committee proposal did not recommend that the equipment selected by the prime bidder be listed in the bid and no procedure was suggested to guide post-contract changes among equipment suppliers.

IV. Discussion of Issues

Various aspects of the issues involved in this study of bidding procedures under construction grants have been covered in previous sections of this report. The purpose of this section is to provide a succinct discussion of these issues based on the review and analysis of current procedures and input to the study in the form of comments and recommendations from outside groups.

A. Nonrestrictive Specifications

The nonrestrictive specification requirements in Section 204(a)(6) of the FWPCA were established in 1972 by Public Law 92-500. This provision requires: "that no specifications for bids in connection with such works shall be written in such a manner as to contain proprietary, exclusionary, or discriminatory requirements other than those based upon performance, unless such requirements are necessary to test or demonstrate a specific thing or to provide for necessary interchangeability of parts and equipment, or at least two brand names of comparable quality or utility are listed and are followed by the words 'or equal'."

The requirement for nonrestrictive specifications promotes competition among suppliers who wish to bid on subtier work on construction grant projects. It encourages the entry of new equipment suppliers and innovative items into the bidding market. Nonrestrictive specifications are consistent with the provision of maximum open and free competition required for public procurements.

While nonrestrictive specifications encourage maximum competition among subtier items, the grantee and his engineer can still maintain control over what will be acceptable for the project, through the preparation of the specification and the acceptance or rejection of "or equal" alternatives proposed by the contractor. Further, if the engineer believes that there is no comparable product to the one he is comptemplating in his design, he may perform a cost effectiveness analysis including operation, maintenance and other life cycle costs, and based on adequate written justification he may specify a single item. Current procedures require this justification to be forwarded and reviewed together with the project plans and specifications.

In accordance with construction grant requirements, innovative or patented products and processes may be named in the specifications if found to be cost effective or if required to demonstrate or test a specific thing. The 1977 amendments to the FWPCA, enacted by Public Law 95-217 encourage the use of innovative and alternative technologies on construction grant projects, by allowing up to 15% higher life cycle costs in the cost effectiveness analyses for such technologies, and by permitting the Federal grant participation for innovative and alternative technologies to be increased from 75% to 85% of the eligible costs. The amendments also provide for 100% modification or replacement grants where innovative or alternative technologies fail to perform, if such failure is not based on negligence. Regulations implementing these provisions were proposed in the Federal Register on April 25, 1978. (43FR17690-720) This emphasis on innovative and alternative technologies should further encourage research and development efforts in the wastewater treatment industry.

The use of innovative technologies would normally be considered during project planning and design. However, the procedures developed to implement these provisions could be used for prequalification of items prior to bidding or during bidding provided the requests for proposals or the bidding documents soliciting proposals clearly indicate the extent to which innovation and life cycle costs will be considered in the prequalification process.

B. Emphasis on Low Dollar Equipment

The nonrestrictive specifications requirements emphasizing maximum free and open competition, can encourage the selection of subtier bid items which have a low cost. However, cost effectiveness analyses may be performed to consider the life cycle costs of specific items and, as discussed in Section A above, those items which are innovative or alternative in accordance with Public Law 95-217, are allowed to have up to 15% higher life cycle costs in the cost effectiveness analysis. During bidding where specific items have not been identified, quality can be controlled by strict adherence to the technical requirements of the specifications and through the process of approving bid items for use in the project.

Any system of competitive bidding appropriate for public procurement necessarily encourages and indeed mandates that the contractor seek out the materials, equipment and construction practices that will provide the desired end product at the lowest cost. Such competitive procedures have always served the public interest in procurements for public facilities. In order to preclude the installation of low quality equipment, the engineer must either write his specification in such a way as to assure the installation of equipment which, in the long run, will prove most cost-effective or he may establish the quality and salient features of the necessary equipment by the naming of two items which meet the requirements of the design. As indicated in Section A. above, a cost effectiveness analysis may be used during design to consider life cycle costs including operation and maintenance in selecting and specifying treatment equipment. Cost effectiveness may also be used as a criteria for approving equipment during bidding and contracting. However, the emphasis that will be given to this criteria in the competition during bidding must be clearly identified in the bid documents.

Except for emphasizing competition and performance and the use of "two brand names or equal" instead of "one brand name or equal," the nonrestrictive specification requirements of Public Law 92-500 have not significantly changed public contracting procedures.

A new Interagency Agreement between EPA and the Corps of Engineers dated January 20, 1978 will expand step 3 construction project inspections and monitoring by utilizing additional Corps construction personnel to augment current step 3 project reviews. The basic agreement is currently being implemented by subagreements at the EPA Regional office and Corps Division office levels. This program will assist the EPA and the grantees in preserving the construction integrity and maintaining the quality of subtier items by helping to assure compliance with specification requirements.

In addition to this joint program with the Corps of Engineers, EPA has also established a Value Engineering program which involves project reviews from the standpoint of quality, reliability and costs. This program looks at costs in terms of required facility performance and therefore provides some additional quality and costs controls.

C. Post Bid-opening Bid Shopping

The perceived detrimental effects of bid shopping have been extensively documented by WWEMA in their input to this study. This input was presented in Section III A of this report and is not repeated here. Although some of the statements in the WWEMA brief have been questioned by other commentors, no arguments have been raised regarding the undersirability of the practice of bid shopping. However, serious problems were identified with proposals to legislate or regulate bid shopping out of existence by imposing a mandatory listing requirement. These comments were also previously presented in Sections III B and C of this report.

In states where bid shopping is viewed as a problem, a variety of bidding procedures have been imposed to control bid shopping. These bidding procedures have met with varying amounts of success, and all seem to have certain drawbacks. However, the states involved have accepted the drawbacks, in order to control bid shopping which they considered a problem. This is of course within their prerogative. The imposition of mandatory anti-bid shopping requirements at the Federal grant program level may conflict with existing state requirements in this area and would be inconsistent with program emphasis on increased state and local decision-making.

Although WWEMA has supplied lists of construction grant projects where bid shopping has occurred, municipal grantees have not highlighted the effects of bid shopping as posing a serious problem to the successful completion of their Federally assisted projects.

Consulting engineers, while concerned with the effects of price emphasis on the quality of equipment installed, have likewise not identified bid shopping as a significant problem. As explained in the subsequent section, many of the concerns regarding quality can be answered with a prequalification procedure.

AGC and at least one AMSA member have identified a need to maintain flexibility in subcontracting and to allow for post-bid negotiations on some aspects of subtier bid proposals, which are normally not clearly defined prior to bidding.

D. Prequalification of Major Items of Equipment

Prequalification of major items of equipment has been recommended as a procedure which would improve bidding and contract performance on EPA construction grant projects. It was further recommended that EPA identify an acceptable prequalification procedure which could be used at the discretion of EPA grantees. These recommendations were made by a joint committee of ACEC, WWEMA and AGC and were covered in detail in Section III E of this report.

Prequalification is a procedure which results in a list of qualified equipment items which meet the requirement of the design. Prequalification as a concept is not prohibited by the FWPCA or EPA regulations, provided adequate competition is maintained in the prequalification process. The key to an acceptable prequalification process is adequate advertisement for equipment proposals and adequate time for equipment suppliers to respond. The information necessary for consideration and the criteria for determining acceptability should be clearly identified. Adequate time is required so as to not limit the number of firms responding. If not handled properly, a prequalification system could have the result of concentrating subtier contract awards to a few well known firms that have gained recognition in their respective fields. The public interest would not be served by providing a mechanism to ease subcontractor bidding problems, if at the same time, adequate competition is reduced. Furthermore, prequalification without proper advertisement and competition may involve anti-trust implications under the broad sanctions of anti-trust legislation enacted to assure free and open competition and to prevent price fixing.

A properly conducted prequalification process could resolve many of the bidding issues which have been raised by groups concerned with bidding on construction grant projects. The grantee, the engineer, the state and EPA would have better assurances that quality equipment was being installed on construction grant projects. The contractor and the equipment supplier would know in advance which equipment would meet the requirements of the specifications.

Adequate competition can be maintained through the use of prequalification while also permitting the engineer and the grantee to take a more active role in selecting equipment items which meet the requirements of the design and operation of the facility. Operation and maintenance costs and procedures may be considered in the development of criteria for the acceptability of items in the prequalification process. However, the extent to which operation and maintenance or other life cycle factors will be considered should be clearly indicated. New and innovative products and patents could also be recognized by the grantee and the engineers in the prequalification process. As explained in Section A above, the 1977 amendments to the FWPCA provide for certain financial incentives for the use of innovative and alternative technologies in construction grant projects. Cost effectiveness may also be considered during prequalification, however, the extent to which cost effectiveness will be used as a criteria in the prequalification process must be clearly identified in the documents requesting prequalification proposals.

Some protests could result from equipment suppliers not being prequalified. However, these could be dealt with, under Agency regulations in an equitable and expeditious manner, provided the engineer has adequately documented the requirements of the equipment being sought and the grounds for rejection of those items which did not meet these requirements.

While prequalification could result in improvements in bidding on construction grant projects, a mandatory prequalification requirement would preempt the grantee's responsibility for bidding and contracting under the grant and may conflict with state and local laws and regulations on bidding procedures.

E. Naming in Bid Submissions

The advantages and disadvantages of naming or listing of subcontractors and equipment suppliers in bids by prime contractors have been discussed extensively in previous sections of this report. Widely differing views on proper procedures have been presented by the various groups involved in the construction grant program. WWEMA alone strongly supports a mandatory listing requirement. AGC and other groups are opposed to such a requirement being mandated by law or Agency regulation. A few commentors could accept listing on a voluntary basis.

Listing is not prohibited by current EPA regulations, and may be used by EPA grantees as long as adequate competition is maintained in the listing process. In fact, based on state and local requirements, a variety of listing procedures are in current use for bidding on construction grants projects.

While a listing procedure could eliminate bid shopping on those items for which listing is required, other problems have been identified with such a requirement. Some of the disadvantages of mandatory listing requirements have already been discussed. An important factor is the need to allow flexibility in bidding and contracting in order to avoid contingency bidding by prime bidders. Since there is no binding contract between the contractor and the subcontractor prior to bidding, post bid negotiations are frequently necessary to bring the scope of work or other features of a subtier proposal into compliance with the specification. Even with a mandatory listing requirement, as suggested by WWEMA, bid shopping would not be prevented in the lower tier subcontracts. Perhaps the most compelling disadvantage of a mandatory Federal listing requirement would be the unwarranted Federal intrusion into contracting and bidding procedures established by state and local laws.

V. Conclusions

The construction grants program was established under the Federal Water Pollution Control Act to aid municipalities in their efforts to abate pollution from municipal wastewater. Consistent with a goal of the Act to increase state and local decision making, grantees are responsible for the settlement and satisfaction of all contractual and administrative issues arising out of procurements under their grants. Grantees may use their own procurement systems and procedures which meet applicable requirements of state and local laws, to the extent that such systems and procedures do not conflict with the minimum requirements established by the FWPCA and EPA regulations. An extensive body of state and local laws exists in the area of construction contracting and bidding procedures. State and local bidding procedures deal with bid shopping and subcontractor listing in a variety of ways. The imposition of mandatory listing requirements on municipal grantees is inconsistent with the increased emphasis on delegation of responsibility and decision-making to state and local governments. Input to this study from grantees, municipal associations, consulting engineers and general contractors has supported the position that such Federal interference is inappropriate.

Although many states have their own anti-bid shopping requirements, the listing of equipment suppliers and the prevention of bid shopping have not generally been recognized as a major item of concern in Federal legislation or regulations. Efforts to promulgate Federal legislation which would require listing of equipment suppliers and limit subcontractor substitution have had limited success. Federal agencies that have established regulations in this area have seriously questioned the wisdom of such actions and in at least one agency, the regulation was dropped. In the construction grant program, bidding is typically handled at the local level. Public interest does not demand the intrusion of the Federal Government in this area, especially when such interjection is not consistent with other objectives of Federal legislation to increase state and local responsibility. Despite the possible detrimental effects of bid shopping there is a demonstrated need to maintain flexibility in subcontracting to avoid contingency bidding. Mandatory listing places a burden on the general contractor to enter into a contract with a subcontractor whose proposal may not meet the requirements of the project.

Prequalification of major items of equipment is a procedure which could result in improvements in bidding and contracting under the construction grants program. However, mandatory prequalification, as with mandatory listing requirements, would impose Federal requirements which should be left to state and local preference. A joint committee of ACEC, WWEMA and AGC support a recommendation for a voluntary prequalification process in the construction grant program. While prequalification is not prohibited by current regulations, the joint committee recommended that EPA go a step further and establish a prequalification procedure acceptable to the Agency which could be used by grantees on a voluntary basis. In the process envisioned by the joint committee, equipment could be prequalified during project design by a competitive process. Adequate competition could be maintained in the prequalification process. The engineer could assure that the items prequalified would meet the requirements of his design. The contractor in selecting among the prequalified items could be assured that the items selected would meet the requirements of the specifications. The quality of equipment installed and the treatment facility performance could be improved through such a process.

Under the FWPCA and its implementing regulations the proprietary specification of innovative technologies may be justified if required to demonstrate or test a specific thing or if found to be cost effective. The 1977 Amendments to the FWPCA enacted by Public Law 95-217 and regulations proposed to implement these amendments further encourage the use of innovative and alternative technologies on construction grant projects by allowing up to 15% higher life cycle costs in the cost-effectiveness analysis for such technologies, and by permitting the Federal grant participation for innovative and alternative technology to be increased from 75% to 85% of the eligible costs.

This study of the bidding process is considered to be conclusive from the standpoint of bidding procedures utilized in the construction grant program. However, EPA has several on-going and planned study efforts which involve the design and construction of publicly owned treatment works (POTW's) and the wastewater equipment industry to a certain extent. These studies are summarized briefly here for information purposes. An operation and maintenance cause and effect survey is being conducted to identify, quantify and rank the causative factors within the broad categories of administration, maintenance, design and operation which have resulted in poor plant performance. The study is not complete. While preliminary results indicate that plant design may be an important factor influencing operation and maintenance, they do not indicate equipment quality as a frequent factor in poor plant performance. A process and mechanical component reliability study is being conducted to determine how variability in process and component reliability effects total plant or system performance. The process reliability phase of the study is currently under way, but the phase dealing with mechanical component reliability was just recently started and results are not yet available. A study of the economic effects of environmental regulations on the pollution control equipment industry is currently under way. This study is scoped to look at basic supply and demand aspects, and capital and employment requirements in the industry; and the economic effects of air, water, and resources recovery environmental regulations on these factors. The preliminary results of this economic study which focuses on the views of the equipment industry indicate many of the same contentions raised in the WWEMA Brief furnished as input to the Congressionally directed study of contracting and bid shopping. While the lowering of profitability and the resulting impediment to innovative technology have been cited, the economic verification of these problems was not readily discernible because of the mix of business from various public and private sources. The results of the economics study are expected to be available later in calendar year 1978. The preliminary recommendations are for further review in this area. An additional study involving the quality of equipment installed on construction grant projects in planned for Fiscal Year 1979. These studies are all part of EPA's efforts to determine the effectiveness of Agency programs and to identify the effects such programs might have on various elements of the public and private sectors.

VI. Recommendations and Proposed Actions

EPA, upon review and analysis of the comments and proposals offered regarding bid shopping, equipment listing and the prequalification of major items of equipment recommends against Federal direction in the form of legislation or regulation changes in this area. Aside from the purely technical considerations used in arriving at this recommendation, serious thought was given to the desirability of Federal intrusion into local bidding and contracting procedures, where a significant body of state and local laws and regulations exists. Further, imposing Federal mandatory requirement in this area is inconsistent with the goal of the Act to increase state and local decision-making.

EPA intends to continue to permit the use of anti-bid shopping procedures, including listing on construction grant projects where such procedures are established by state and local requirements or preference.

In order to permit the consulting engineer and the grantee to take a more active role in the selection of quality equipment items necessary for the successful operation of the completed facilities, and still maintain the open competition appropriate for public procurements, EPA plans to review basic prequalification procedures to identify, for voluntary use, the necessary minimum elements for prequalification which would comply with the nonrestrictive specifications requirements for adequate competition.

In order to further facilitate the use of innovative technologies in construction grant projects, EPA plans to reemphasize existing guidelines which permit the use of proprietary specifications for innovative products and processes.

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APPENDIX A

DIRECTION OF THE CONFERENCE COMMITTEE

Conference Report Accompaning H.R. 3199,
95th Congress, 1st Session, House of Representatives
Report No 95-830, Pages 113-14

WATER TREATMENT CONTRACTING AND BID SHOPPING

Information was received that section 204(a)(6) of the 1972 Act which provides that no bids for equipment for treatment works may specify particular brand names, has been interpreted in current regulations in a way which requires acceptance of the low-dollar treatment equipment bid in practically all circumstances. Also, there is concern that post-contract bid shopping for lower-tier equipment suppliers by successful bidders for grantee construction contracts has increased.

Information on potential problems posed by post bid-shopping and the emphasis on low dollar bid, has also been presented to the Environmental Protection Agency by concerned equipment suppliers. The conferees direct the Administrator to review implementation of the section 204(a)(6) provisions to determine if any modifications of regulation or law may be necessary or appropriate. The Administrator is expected to include in the review an evaluation of whether or not principal subcontractors and equipment suppliers should be named in bid submissions for treatment works. The Administrator shall submit this report to Congress within 3 months after enactment of this Act. The Administrator should include an outline of any proposed actions, together with recommendations for any necessary legislation.

APPENDIX B

Groups, Agencies, and Individuals Contacted and Providing Input to the EPA Study of Wastewater Treatment Contracting and Bid Shopping

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American Consulting Engineers Council
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American Public Works Association
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Associated General Contractors
Washington, D.C.

Association of Metropolitan Sewerage Agencies
Washington, D.C.

National Association of Counties
Washington, D.C.

National Clay Pipe Institute
Washington, D.C.

National League of Cities
Washington, D.C.

Water and Wastewater Equipment Manufacturers
Association
McLean, Virginia

Water Pollution Control Federation
Washington, D.C.

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Department of Interior

Department of Transportation
- Federal Highway Administration
- Urban Mass Transportation Adm.
- Federal Aviation Administration

General Services Administration

Naval Facilities Engineering Command

US Army Corps of Engineers

US Environmental Protection Agency
Region I through X

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WWEMA

December 2, 1977

Mr. Douglas Costle, Administrator
United States Environmental Protection
Agency
401 M Street, S.W.
Washington, D.C. 20460

Dear Doug:

In further regard to our correspondence (your letter of July 8, 1977) and discussions regarding the problems of post bid peddling and shopping in the Construction Grants Program, we understand that the House/Senate Conference Committee adopted the language of the Senate report and that, assuming the Clean Water Act passes, your office will be asked to review implementation of the Section 204(a)(6) provision to determine if any modification of regulation or law may be appropriate.

In anticipation of passage of the Act and to facilitate consideration of this matter by the EPA, WWEMA has prepared a brief on anti-bid peddling and shopping and has drafted a proposed regulation on this subject.

Attached are excerpts from the brief. We will hand deliver the complete brief, together with all appendices, to the office of Mrs. Joan Bernstein next week.

We appreciate EPA's interest in this severe problem facing the equipment manufacturing industry and hope this information is of assistance to the Agency in reaching a solution.

Sincerely,

Frank

Frank P. Sebastian
President

FPS/f
Attachment
cc: Mrs. J. Bernstein

Before the
Environmental Protection Agency

In the matter of

ANTI-BID SHOPPING AND BID PEDDLING REGULATIONS

Brief submitted by The WATER
and Wastewater Equipment
Manufacturers Association, Inc.
advocating the adoption of a
regulation to eliminate bid
shopping and bid peddling.

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APPENDIX III *Note*, *Another Look at Construction Bidding and Contracts at Formation*, 53 Va. L. Rev. 1720 (1967).

✓

Introduction

Questions have arisen whether the practices of bid shopping and bid peddling on EPA construction grant projects are contrary to the public interest and, if so, whether effective regulations to prohibit such practices can be formulated without creating an undue administrative burden.

In this brief, it is contended that bid shopping and peddling are, without question, inimical to the public interest, and, in Part I hereof, some of the detrimental effects of bid shopping and peddling are discussed. It is further contended that these undesirable practices can be eliminated by regulations which are both effective and simple to administer. A copy of such a proposed regulation is attached hereto as Appendix A and is discussed in Part II of the Brief.

Background; Definitions

On EPA financed construction projects, subcontract work is immensely important and often constitutes the great majority of the work. Specialized, sophisticated equipment, supplied and installed by industry manufacturers, is an integral component of most wastewater treatment works. The prime contractor's role on such projects is in good part that of a broker of subcontracts. It is of considerable interest to the EPA and the public that the subcontracting process shall result in the furnishing of quality equipment at an economical price to grantees, thereby giving taxpayers the most for their tax dollars.

In theory, subcontracts are procured on the basis of a widely accepted competitive bidding procedure. The prime contractor takes bids from prospective subcontractors and accepts the bid of the lowest responsible subbidder. Unfortunately, the theory has been undermined by the twin practices of bid shopping and bid peddling. The prime contractor who is awarded the contract finds himself in a vastly improved bargaining position; he controls the subcontract market for that project. He only has a commitment to do the job for a set price. In this position, it is to the prime's advantage to attempt to reduce his costs. A major cost is the amounts he must pay to subcontractors.

Bid shopping is the practice the prime contractor employs to reduce his subcontract costs. The prime takes the low subbid received prior to bid opening and asks whether other subbidders can beat this price.

If the subcontractors who were not low prior to bid opening initiate the process by lowering their original bid to the prime, the practice is called bid peddling. Bid peddling is simply the reverse side of the coin.

Manufacturers of major items of specialty equipment are in the same position as are other subcontractors. They, too, have submitted subbids and may peddle if they were not low subbidders or may be shopped if they were the prime's low subbidder. Because, on EPA projects, equipment is a very substantial part of the costs, the prime has a great incentive to reduce equipment subcontract costs and inflate his profits in this area, without any benefit to the grantee.

"Bid shopping," as used in the explication of it above, and as used throughout this brief, refers to the prime contractor's shopping for a lower bid after the prime bids have been opened. This is not to be confused with the legitimate practice of procuring the lowest possible subbid from subcontractors before the prime contractor submits its bid. (A regulation prohibiting bid shopping will actually enhance pre-bid opening competition and will lead to a lower price) for the grantee and EPA and a healthier wastewater industry.

"Subcontractor," as here used, refers not only to those ordinarily considered subcontractors but also to major equipment suppliers who, on EPA projects, hold a position similar to that of ordinary subcontractors.

I. THE PRACTICES OF BID SHOPPING AND BID PEDDLING ARE DETRIMENTAL TO GRANTEES, THE EPA, AND THE PUBLIC AND SHOULD BE CONTROLLED.

A. Bid Shopping Controverts Accepted Competitive Bidding Procedures and is Widely Condemned as Unethical.

Competitive bidding throughout the construction industry adheres to the theory that all bidders should submit their best bid and that the contract should be awarded to the lowest responsible bidder. Bid shopping perverts this accepted practice by allowing the winning prime contractor (hereinafter, "prime") a second chance to receive a lower bid. All the benefits of this second chance accrue only to the prime and not to the grantee and EPA.

Once the prime uses a subcontractor's or equipment supplier's (hereinafter, "subcontractor") bid in preparing a bid for the grantee, a subcontractor is generally bound by the terms of his bid. The theory of estoppel protects the prime. But the subcontractor is not reciprocally protected. Even though the subcontractor has incurred costs in preparing his bid, the courts find no action in reliance on the implicit promise by the prime to accept the low subbidder. The bid would have been prepared whether the subcontractor was low or not. Since the subcontractor has not detrimentally acted in reliance, estoppel is inapplicable, and the prime is legally free to shop for a lower subbid.

The winning prime is in a strong position. First, his subcontractor is bound to him but he is not reciprocally bound to the subcontractor. Second, he has a monopoly over awards of work on the job. See Electronic & Missile Facilities, Inc. v. U.S. for the Uses of H. W. Moseley, 306 F. 2d 554 (1962). Third, he knows the amount of his subcontractor's bid and the amounts of other would-be subcontractors' initial bids. He can reveal the bid of his subcontractor to the others and ask whether they can beat the subcontractor's price, that is, he can bid shop.

The prime may be in an even stronger position if he is privy to select information about the bids. Perhaps he required subbidders to reveal equipment or techniques they planned to use. The prime can now reveal information provided by one subbidder to others, in hopes that the other subcontractors will make use of this knowledge to lower their bids.

Recognizing the fundamental unfairness inherent in the bid shopping illustration sketched above, the Associated General Contractors of America have condemned bid shopping in their Code of Ethical Conduct (1960 ed.):

> "Ethical conduct with respect to subcontractors and those who supply material requires that:
>
> 1. Proposals should not be invited from anyone who is known to be unqualified to perform the proposed work or to render the proper service.
> 2. The figures of one competitor shall not be made known to another before the award of the subcontract, nor should they be used by the contractor to secure a lower proposal from another bidder.

3. The contract should preferably be awarded to the lowest bidder if he is qualified to perform the contract but if the award is made to another bidder, it should be at the amount of the latter's bid.

4. In no case should the low bidder be led to believe that a lower bid than his has been received."

The American Architect's Handbook similarly disapproves of bid shopping. See American Institute of Architects, Handbook of Architectural Practice, Book IV, p. 702 (1958).

B. Cost Reductions Obtained Through the Use of Bid Shopping Accrue Only to the Prime Contractor and Do Not Benefit the Grantee and EPA.

The theory of competitive bidding is that free and open competition will produce the lowest price for the grantee and government. This theory is perverted by the practice of bid shopping because a large part of the competition goes on after the price to the grantee and government has been set. That price is, therefore, artificially high.

It might be answered that primes will lower their profit margins and reduce their initial bids in expectation of later reductions of their subcontracting costs. But this tactic entails a large amount of risk since the prime cannot know how much of a reduction he can expect. A price is always paid for the bearing of a risk; the grantee and EPA pay this price.

On EPA wastewater treatment grant projects, subcontract work constitutes the majority of the work required. The amount of risk a prime making such deductions bears would be great indeed. Primes should not be in the business of bearing these unnecessary risks which can only contribute to the financial insecurity and insolvency of many primes.

Moreover, it is not clear that primes actually do reduce their initial bids in expectation of future reductions of subcontracting costs, perhaps because the risks inherent in it are simply too great.

C. *Bid Shopping Causes Subcontractors to Inflate or "Pad" Their Initial Bids, Upon Which the Price to the Grantee and EPA is Based, and to Refrain from Bidding Altogether.*

Subcontractors have responded to widespread bid shopping with tactics of their own, all of which are detrimental to the interests of the industry and EPA. One response is to refuse to bid to known bid shoppers altogether. *See* *Comment*, *Bid Shopping and Peddling in the Subcontract Construction Industry*, 18 UCLA L. Rev. 389, 395 (1970); *Note*, *Another Look at Construction Bidding and Contracts at Formation*, 53 Va. L. Rev. 1720 (1967). Competition is then reduced. A second response is to pad the initial price. *See* *Ring Constr. Corp. v. Secretary of War*, 8 T.C. 1070 (1947); *Comment*, *supra*, 18 UCLA L. Rev. 389 (1970); *Note*, *supra*, 53 Va. L. Rev. 1720, 1737 (1967) [reporting a survey of Virginia subcontractors in which a number indicated that they would "puff" their bids]. Padding is sensible, given a practice of bid shopping, since the subcontractor will get a second chance to submit his lowest bid but would not have the opportunity to raise his price later if he happens to initially bid lower than necessary. Moreover, at the bid shopping stage, the subcontractor will be fully aware of the price he must beat.

When there are few potential subbidders or more complex bid preparation requirements, more initial padding and abstinence from bidding can be expected. To illustrate, if there are ten subcontractors, no one is likely to submit a bid greatly lower than would have been necessary to secure the award. Bidders may be reluctant to pad because the prime, with so many subbidders to choose from, may bid shop only lower subbidders. Blatant bid shopping, such as resoliciting from all ten, might be avoided as too detrimental to the prime's image. But, if there are only two subbidders, there is a greater possibility that the competition will bid well above the low subcontractor's bid. There is more reason to pad in hopes that this turns out to be so.

When bid preparation costs are great, there is good reason for a subbidder to refrain from bidding entirely, especially if subcontractors are required to submit work sheets or other submittals which show how they arrive at their bids. Competition may utilize these work sheets in preparing its own costs, cutting its overhead, and pirating ideas.

It is apparent that the inhibition on competition is greatest when competition is already least. In EPA financed jobs, submittals, which reveal bid preparation methods, are often required from subcontractors. Frequently, only a few subcontractors or suppliers bid due to the highly technical nature of the work and equipment. It can be expected that padding and refraining from bidding are greater actual or potential problems on EPA financed jobs.

D. Bid Shopping Pressures Subcontractors to Do Shoddy Work or to Work at a Loss, and it Rewards Primes for Unethical and Ruthless Conduct.

It is apparent that the prime most willing to bid shop has the competitive edge. Bid shopping rewards the unethical and ruthless prime.

The subcontractor also is tempted to unethical conduct in the form of doing an inadequate job.

> "[S]ubcontractors who are forced into post-award negotiations with the [prime] often must reduce their sub-bids in order to avoid losing the award. Thus they will be faced with a Hobson's choice between doing the job at a loss or doing a less than adequate job." Comment, Bid Shopping and Peddling in the Subcontract Construction Industry, 18 UCLA L. Rev. 389 (1970).

The question arises why any subcontractor would do the job at a loss. The answer is particularly applicable to EPA jobs which involve high bid preparation or planning costs. It will be advantageous to go ahead with the job if the bid price is less than the marginal cost of completing the job. For example, if the subcontractor has already incurred preparation costs of $10x and can complete the job for $100x, the subcontractor will reduce its bid down to $101x. This will minimize its losses. Only $9x instead of $10x will be lost by accepting a contract of $101x.

E. Bid Shopping is Detrimental to the Long-Range Interests of the EPA and the Nation in that Research and Development of Wastewater Technology is Discouraged as a Result of the Practice.

The Federal Water Pollution Control Act Amendments of 1972 expressed a national goal of eliminating water pollution by 1985. To this end, it and subsequent acts of Congress have authorized the expenditure of billions of dollars, in what has been called the largest public works project in history, to clean up our nation's waterways. In part, these sums are expended directly for research and development of the technology necessary to clean our waterways. Additionally, through the construction grants program, it was expected that private enterprises would participate in advancing waste treatment technology to the point where the Nation could attain its national clean water goal.

It is evident that private enterprise will spend money for research and development only if an area of investment is profitable. Bid shopping unfairly takes profits due the suppliers of waste treatment equipment and gives them to prime contractors. Bid shopping thus reduces profitability of those companies who must anticipate profits in order to justify expenditures for research and development of new equipment and technology needed if the nation's waters are to be cleaned.

F. Equipment May Be Ordered Sooner if Bid Listing is Required.

Demand for specialized components of many EPA financed projects is great and has frequently led to delays in receiving equipment. Furthermore, much of the equipment used must be custom-made; this takes time. If a subcontractor is the prime's low bidder but may be bid shopped, that subcontractor cannot yet order equipment. This fact can result in delays and unexpected increased costs to the subcontractor. If a bid listing regulation makes use of the subcontractor mandatory, however, the subcontractor can order equipment immediately and avoid delays and price increases.

G. Summary of the Adverse Effects of Bid Shopping and Peddling.

The practice of bid shopping and bid peddling is detrimental to grantees and the Government. First, contract prices are higher to both as a result of the practice. Subcontractors pad their bids to the prime to allow room for negotiation and reduction later. Subcontractors refuse to bid to primes with reputations as notorious bid shoppers. Most importantly, competition which could and should lower the price to the grantee and government goes on after the prime's price to the grantee and government has been determined. Only the prime benefits from this competition. Second, bid shopping harms subcontractors and decreases subcontractor competition. It increases the risks and loss involved in preparing bids. It forces upon subcontractors the "Hobsian choice" of doing the job at a loss or cutting corners in doing the work. It discourages research and development to the extent that EPA contract work becomes minimally profitable for equipment suppliers. Delays result because equipment cannot be ordered immediately. Third, bid shopping is unfair and widely recognized as unethical. The practice rewards the ruthless and unethical prime and discourages responsible conduct on the part of the subcontractor. Bid shopping perverts the accepted competitive bidding practice, forcing upon subcontractors a "second round" of competition.

A bid listing requirement can bring fairness, lower costs, and true competitive bidding back to EPA projects.

II. AN EFFECTIVE ANTI-BID SHOPPING AND BID PEDDLING REGULATION CAN BE ADMINISTRATIVELY WORKABLE, WOULD MINIMIZE PROTESTS, AND WOULD NOT BURDEN THE EPA OR ITS GRANTEES.

It has been established that bid shopping and peddling have numerous harmful effects and are practices inimical to the public interest. The question remains whether bid shopping and peddling can be eliminated by a practical regulation which does not unduly burden grantees or the EPA. As shown below, the answer must be in the affirmative.

The Waste and Wastewater Equipment Manufacturers Association, Inc. respectfully proposes that the Administrator adopt a regulation, a copy of which is appended hereto as Appendix A, to prohibit bid shopping and peddling.

It is suggested that the regulation be added at 40 CFR §35.938-10. This addition would require slight modification of §35.938-9.

A. The Proposed Regulation Will Be Effective, Easy to Administer, and Fair.

1. The proposed regulation will be effective.

First, the proposed regulation requires primes to list subcontractors for certain clearly specified categories of work. It requires the grantee to provide a form for this purpose so that mistakes will be absolutely minimized. The prime only needs to fill in clearly marked blanks.

If the prime fails to complete the listing form, the bid must be rejected as nonresponsive.

Second, the proposed regulation requires primes to employ the listed subcontractor unless clearly specified and unambiguous grounds for substitution exist. If the prime insists on bid shopping and fails to obtain substitution as provided, the grantee terminates the contract or assesses a penalty of twenty percent (20%) of the subcontract price. A flexible enforcement mechanism is provided. It is anticipated that most primes, if they infringe, will be assessed a penalty. No disruption of the job will occur. The possibility of reduction of the contract price coupled with the possibility of termination will be adequate to induce compliance.

2. The proposed regulation is easy to administer.

The grantee has four (4) simple functions under the proposed regulation. First, it copies the contract provision, set out verbatim in the proposed regulation, into its Information for Bidders.

Second, the grantee must determine the categories of work for which listing is required. Engineers will have little difficulty with this requirement as they must be intimately familiar with the job after preparing the specifications. (Only categories of work exceeding three percent (3%) of the estimated cost need be listed, eliminating the small items of work.)

Third, if the prime wishes to substitute an unlisted subcontractor for any one of the enumerated acceptable reasons, the prime prepares a simple request for substitution stating his reasons. The grantee advises the listed subcontractor of the request and holds a hearing on the matter if necessary. His determination to allow or disallow the substitution is final.

Fourth, if a prime fails to follow the simple substitution procedures, the grantee assesses a penalty or terminates the prime's contract after holding a hearing on the matter.

The proposed regulation affects the EPA less than it affects the grantee. First, the EPA should determine whether the grantee has the required clause in its Information for Bidders. This is simple to determine since the clause is fully set forth in the proposed regulation.

Second, the EPA determines that the Specifications include the form entitled List of Subcontractors and Equipment Suppliers.

Both of these tasks are extremely simple.

Since the grantee's determination as to the existence or nonexistence of the grounds for substitution is final, the EPA is not involved.

Third, the EPA may entertain a small number of protests if grantees ignore the clear mandate of the proposed regulation by awarding the contract to a bidder who fails to complete the prime's own bid listing form.

3. The proposed regulation fairly secures the benefits sought while providing for those instances when a prime contractor must legitimately employ an unlisted subcontractor.

The proposed regulation recognizes that primes may legitimately be compelled to employ a subcontractor other than the one listed. In those instances, the prime can substitute a subcontractor of his choice after requesting permission of the grantee.

Substitution is to be permitted if the subcontractor fails to perform his contract, fails to execute a subcontract, becomes insolvent, is not properly licensed, or performs substantially unsatisfactorily in the eyes of the grantee. The grantee is to provide a hearing on the issue of substitution if the affected subcontractor requests one. Thus, the proposed regulation secures the benefits of full and fair competition without locking the prime into an unacceptable subcontract.

B. The Proposed Regulation Minimizes Delays and Protests.

One of the most frequent concerns voiced about anti-bid shopping regulations is that they will spawn protests. Under the proposed regulation, it is believed that protests will be rare and the issues simple.

First, primes can protest if the grantee fails to include the contract clause "Listing of Subcontractors and Equipment Suppliers" set forth in the proposed regulation or the List of Subcontractors and Equipment Suppliers form which the grantee must prepare. The existence or nonexistence of these forms is objectively determinable. Second, a prime could protest the categorization of subcontract work. As a practical matter, primes will not make such protests, which must be commenced within one week after the IFB is published, because the categorization means little or nothing to them. Furthermore, categorization, done by grantee's engineers, will conform to accepted trade practice and is unlikely to engender controversy. Third, a prime can protest if the grantee awards the contract to a prime which failed to complete the listing form. Again, a failure to complete the form will be clear from the face of that document. Either the blanks are filled in or not.

It is believed that no new grounds for protest are provided under the proposed regulation.

Subcontractors' rights would still be limited by 40 CFR §35.939(j)(6). Hence, subcontractors would not be provided any new grounds to protest under the proposed regulation.

Even if the above protest section were amended to allow subcontractor protests under the proposed regulation, the protests would be fully as simple to resolve as prime contractor protests. Note that subcontractors will never be able to protest from an adverse ruling permitting substitution since protests are limied to contentions that the contract should not be awarded in a particular way. Substitution would occur only after the award of the contract.

Protests, then, will be an extremely minor problem under the proposed regulation.

Delays are, of course, generally a result of lengthy protests which are not anticipated. The only other possible delay anticipated as a result of the proposed regulation is the possible ten (10) day delay in the event that substitution is requested and challenged. This is of little consequence.

Additionally, the project will be expedited in that subcontractors will be able to order necessary equipment or begin its manufacture and preparation earlier than is now the case. Subcontractors will be sure that the subcontract will be awarded to them once the award to the prime is made and will be able to prepare to perform at that time.

The General Services Administration (GSA), who is responsible for direct federal procurements, has operated for several years under regulations which require subcontractor listing. The avowed purpose of the GSA regulations is to prevent bid shopping and peddling, which practices the GSA has investigated and found to be contrary to the public interest. The GSA has recently reviewed its regulations and reconfirmed their necessity. The regulation proposed in the following is simpler and would be less complex to administer than existing GSA regulations.

Conclusion

Bid shopping and peddling reduce the effectiveness of the competitive bidding system and cause numerous ill effects including higher construction costs to EPA grantees. The practices can be effectively controlled in a manner that would restore fairness to the wastewater treatment works construction industry. A regulation can be effective, fair, and easy to administer.

The Water and Wastewater Equipment Manufacturers Association, Inc. respectfully requests that a regulation to control the practices of bid shopping and bid peddling be adopted by the Environmental Protection Agency.

APPENDIX I

PROPOSED REGULATION

§35.938-10 BID SHOPPING AND PEDDLING

(a) The EPA finds that the practices of post bid opening bid shopping and bid peddling deprive the public of the full benefits of fair and orderly competition among prime contractors, subcontractors and equipment suppliers. Grantees shall prohibit such practices in accordance with this subsection.

(b) As used in this subsection, "subcontractor" shall mean the individual or firm with whom the bidder proposes to enter into a subcontract for manufacturing, fabricating, installing, or otherwise performing work under this contract. "Subcontractor" includes any supplier of equipment with whom the bidder proposes to contract if (1) the equipment supplier performs work, such as installation, on the project; or (2) the equipment supplied is manufactured specially for the project; or (3) the equipment supplied, although not manufactured specially for the project, is ordinarily used only for wastewater treatment purposes.

(c) For any construction project receiving grant funds for the construction of wastewater treatment works and having a total estimated cost of more than $150,000.00, the grantee shall determine categories of work for which subcontractors' names must be listed in accordance with the Listing of Subcontractors and Equipment Suppliers specified in paragraph (d). The grantee shall publish these categories in the Proposal or a separate form provided to bidders for the purpose of listing subcontractors. The grantee shall make reference to the specific sections of the Specifications describing each category of work for which subcontractors are to be listed. Categories designated shall include those which the grantee estimates to comprise at least three percent (3%) of the total estimated cost of the contract.

(d) For any construction project receiving grant funds for the construction of wastewater treatment works and having an estimated total cost of more than $150,000.00, the grantee shall include the following in the Information for Bidders:

"Listing of Subcontractors and Equipment Suppliers

> (A) For each category in the List of Subcontractors and Equipment Suppliers, which is included as part of the bid forms, the bidder shall submit the name of the individual or firm with whom he proposes to contract for performance of such category. The bidder may enter his own name for any category which he will perform.
>
> (B) If the bidder intends to subcontract with more than one subcontractor for a category or to perform a portion of a category with his own personnel and subcontract with one or more subcontactors for the balance of the category, the bidder shall list all such individuals or firms (including himself) and state the portion (by percentage or narrative description) of the category to be furnished by each.
>
> (C) Failure to provide a complete List of Subcontractors and Equipment Suppliers shall cause the bid to be considered nonresponsive.
>
> (D) The work of each category shall be performed by the listed individual or firm unless substitution is permitted by the Owner in accordance with paragraph (E) and (F). Failure to obtain approval for substitution or failure to proceed with the work by or through the named subcontractor or supplier shall be grounds for termination of the contract or assessment of a penalty under paragraph (G).

(E) Substitution shall be permitted by the Owner only under the following conditions:

(1) When the listed subcontractor or supplier, after reasonable opportunity to do so, refuses or fails to execute a written contract with the contractor, when such written contract based upon the general terms, conditions, plans, and specifications for the project involved or the terms of such subcontractor's bid is presented to him by the prime contractor; or

(2) When the listed subcontractor or supplier becomes bankrupt or insolvent; or

(3) When the listed subcontractor or supplier refuses to perform his subcontract; or

(4) When the subcontractor is not properly licensed; or

(5) When the Owner determines that the work performed or equipment offered by the subcontractor is substantially unsatisfactory and not in accordance with the plans and specifications or that the subcontactor is substantially delaying or disrupting the progress of the work.

(F) Prior to approval by the Owner of substitution:

(1) The prime shall submit to the Owner a written request for substitution, specifying the reasons for the request.

(2) The Owner shall notify the listed subcontractor or supplier of its receipt of said request for substitution and shall supply the subcontractor or supplier with a copy thereof. The Owner shall further notify the listed subcontractor or supplier that it shall have five (5) working days to object either orally or in writing to the substitution.

(3) If within five working days after receipt of notice of the request for substitution, the subcontractor objects, the Owner shall on at least five working days notice, hold a hearing on the prime contractor's request. The Owner's determination as to the existence or nonexistence of the grounds for substitution shall be final.

(G) In the event that the prime contractor makes a substitution of a listed subcontractor or supplier without obtaining prior approval in accordance with paragraphs (E) and (F) above, the Owner shall, after holding a hearing, in its sole discretion either terminate the contract or assess a penalty against the prime contractor of twenty percent (20%) of the original subcontract price."

(H) In a hearing according to paragraph (G) above, it will be rebuttably presumed that the cost to the prime contractor of any equipment proposed to be substituted is less than the equipment named in the specifications and if the substitution is approved, the contractor's price shall be reduced by an amount equal to the net savings."

APPENDIX II

Comment, Bid Shopping and Peddling in the Subcontract Construction Industry, 18 U.C.L.A. L. Rev. 389 (1970).

COMMENTS

BID SHOPPING AND PEDDLING IN THE SUBCONTRACT CONSTRUCTION INDUSTRY

I. INTRODUCTION

At common law both the general contractor and subcontractor were left unprotected in the construction bidding process. Anytime prior to the general contractor's formal "acceptance" of the subcontractor's "offer" both parties remained uncommitted.[1] As a result, many commercially detrimental practices evolved within this bidding process. Modern courts, recognizing some of the problems created by the common law approach, have attempted to afford some protection—at least to the general contractor—in the subcontract bidding situation. Led by the California Supreme Court's decision in *Drennan v. Star Paving Co.*,[2] this change in the traditional approach to construction bidding has eliminated any fear by the general contractor that a subcontractor would back out of his sub-bid after it had been relied upon in the preparation of the general contractor's own estimate on a prime contract. While this change reduced the injustices that sometimes resulted under the old approach, it has tended to increase the ability of the general contractor to engage in post-award negotiations, a practice which has pervasive detrimental effects on the parties involved in the bidding process.

This state of the law has resulted from the inappropriate response of the legal system to regular practices of the construction industry. The law that governs general/subcontractor bidding relations was formed in the context of a factual mistake in the bidding process rather than in the context of usual commercial practices. Consequently the law affords insufficient protection for the parties in circumstances more typical than those of a mistake in bidding. By framing the law which regulates subcontract bidding in the rarefied air of "offer and acceptance" and "unilateral mistake" rather than in the real world of commercial practice, the legal system has fostered unethical bid shopping and peddling. Recognizing the evil effects of these practices, a few courts and commentators have sought and suggested methods of controlling them. However, since other courts to a large extent continue to deal with these problems in a traditional frame of reference, relying upon cases involving mistake, attempts at control have been inadequate. Courts should look to the problems—bid shopping and peddling—as they exist in practice and form pragmatic solutions to them.

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[1] 1 A. CORBIN, CORBIN ON CONTRACTS §§ 22-94 (rev. ed. 1963) [hereinafter cited as CORBIN].

[2] 51 Cal. 2d 409, 333 P.2d 757 (1958)

II. THE HISTORICAL FRAMEWORK

At common law, the seal made offers firm without the necessity of consideration.[3] The dissolution of this rule left a void in the law of contract formation,[4] particularly within the typical general contractor-to-subcontractor relationship of the construction industry. It is common practice for a general contractor to subcontract out part of the work on a prime contract. Typically, the general contractor will receive estimates from several subcontractors on a particular item of work. The general will then usually "take," but not contractually "accept," the lowest of these estimates and use it in preparing its bid on the overall contract. From this point until a formal acceptance of the subcontractor's offer, the absence of contractual liability has assumed great significance.

The first major case dealing with the general contractor/subcontractor[5] relationship was *James Baird Co. v. Gimbel Bros. Inc.*[6] As in many of the cases which have made the law in this area of contract formation, *Baird* deals with a mistake in the bid preparations and the attempt of the mistaken party to avoid the result of his error.[7] In *Baird*, Judge Learned Hand rejected the general's contention that the subcontractor should be held to his bid under the doctrine of promissory estoppel.[8] That doctrine, which had recently been generalized in section 90 of the *Restatement of Contracts*,[9] was viewed by the court as designed to avoid the harsh results of allowing a donative promisor to repudiate his promise after it had been relied upon by the promisee. But, Judge Hand concluded, the doctrine had no application in a commercial transaction such as that involved in *Baird*, where "an offer for an exchange is not meant to become a promise until a consideration has been received."[10]

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[3] *See* CORBIN, *supra* note 1, at § 240; Crane, *The Magic of the Private Seal*, 15 COLUM. L. REV. 24 (1915).

[4] CORBIN, *supra* note 1, at § 257; 1 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 55 (3d ed. 1957) [hereinafter cited as WILLISTON].

[5] The term "general contractor" [hereinafter often referred to as "general"] as used in this Comment means the party bidding on the prime construction contract. The term "subcontractor" means the party bidding on specific portions of the construction contract being bid upon by the general (first tier subcontractors). The term "awarding authority" refers to the party, either government or private, which lets the prime contract.

[6] 64 F.2d 344 (2d Cir. 1933).

[7] In *Baird* the defendant, a linoleum subcontractor, underestimated by about one-half the proper cost of the job. The subcontractor, upon recognizing his mistake, refused to perform the job at the price submitted even though the general had relied upon that estimate in preparing its own bid. *Id.* at 345.

[8] *Id.* at 346.

[9] RESTATEMENT OF CONTRACTS § 90 (1932). The Restatement does not use the

Thus *Baird* barred the use of promissory estoppel as a method of holding the subcontractor to his bid. In a jurisdiction adhering to the *Baird* view, therefore, both the general and subcontractor are left unprotected by the law in the typical bidding situation, unless of course there has been a formal acceptance of the subcontractor's bid.[11] The general, under *Baird*, is free, even after the award of the prime contract—based on an estimate including the subcontractor's bid—to negotiate with other subcontractors for lower prices. The consequences of this freedom depend upon the nature of the market. If the market for subcontract construction jobs is competitive, the general would prefer to be able to negotiate for lower bids after the award of the prime contract. If, on the other hand, prices for subcontracting services are increasing, the general would want to hold the subcontractor to his original bid. This uncertainty is incongruous in a commercial system in which the parties are often forced to depend upon one another.

In its decision in *Drennan v. Star Paving Co.*,[12] the California Supreme Court attempted to alleviate some of the problems created in the construction bidding process by the common law. As in *Baird*,

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term "promissory estoppel," but that doctrine and the rules of section 90 are generally understood to entail the same theory of reliance. *See* 1A CORBIN, *supra* note 1, at § 204. *See generally* Boyer, *Promissory Estoppel: Requirements and Limitations of the Doctrine*, 98 U. PA. L. REV. 459 (1950).

[10] 64 F.2d at 346. Although the *Baird* decision was followed by the majority of jurisdictions, Judge Hand's view of the narrow scope of section 90 was never fully accepted. *See, e.g.*, Robert Gordon, Inc. v. Ingersoll-Rand Co., 117 F.2d 654 (7th Cir. 1941); Northwestern Eng'r Co. v. Ellerman, 69 S.D. 397, 10 N.W.2d 879 (1943). However, some courts still apply the *Baird* rationale, refusing to apply section 90 to other than non-bargain promises. *See, e.g.*, Wright v. United States Rubber Co., 280 F. Supp. 616 (D. Ore. 1967); Tatsch v. Hamilton-Erickson Mfg. Co., 76 N.M. 729, 418 P.2d 187 (1966).

Scholarly comment on the *Baird* approach to the firm offer problem was mixed. *Compare* Sharp, *Pacta Sunt Servanda*, 41 COLUM. L. REV. 783 (1941) and CORBIN, *supra* note 1, at § 51 *with* S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 139 n.25 (rev. ed. 1936) and ALI, UNIFORM REVISED SALES ACT 123 (proposed final draft No. 1, 1944).

[11] The general could protect himself before the award of the subcontract by use of a bid bond or option contract. However, neither these nor other such devices are frequently used in the construction industry. *See* Schultz, *The Firm Offer Puzzle: A Study of Business Practice in the Construction Industry*, 19 U. CHI. L. REV. 237, 262 (1952) [hereinafter cited as Schultz].

[12] 51 Cal. 2d 409, 333 P.2d 757 (1958).

Drennan arose in the context of a bid mistake by the subcontractor, resulting in his attempt to withdraw the sub-bid subsequent to its use, but prior to its formal acceptance, by the general. Unlike *Baird* however, Justice Traynor, writing for the court in *Drennan*, found a way to hold the subcontractor to his bid. The court first found in the subcontractor's offer an implied subsidiary promise not to revoke for a reasonable length of time.[13] The court was then able to apply the doctrine of promissory estoppel to this implied promise and hold that the general's reliance on the paving subcontractor's bid had the effect of making the bid irrevocable. Thus a general contractor would now be permitted the option of accepting the bid within a reasonable time.[14]

By rejecting the *Baird* rationale, *Drennan* paved the way for the application of promissory estoppel in the context of commercial transactions.[15] This expanded scope of section 90 offers the general full protection against the subcontractor wishing to back out of his sub-bid after the general has justifiably relied thereon. Hence, one of the difficulties left by the common law approach, namely, a general committed to do a job at a given price but with no subcontractor to perform at the bid estimate, is resolved by the *Drennan* decision. In a jurisdiction following the California doctrine, the general is thus placed in a stronger position than under the *Baird* approach.[16] The *Drennan* holding permits the general to negotiate for lower bids if the market is competitive or to choose, instead, to hold the subcontractor to his bid if prices are increasing.[17] Under *Baird* the subcontractor could be in an advantageous or disadvantageous position depending upon the nature of the market. Under *Drennan*, however, the general is able to choose whether to hold the subcontractor to his bid or not depending upon its own market position, thereby eliminating any possible advantage to the subcontractor.

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[13] Once the court had implied the subsidiary promise—a promise not supported in the form of either part performance or consideration—it used the reference in comment *b* of section 45 (the unilateral contract provision) to section 90 as a means of invoking promissory estoppel. 51 Cal. 2d at 414, 333 P.2d at 760. *See* RESTATEMENT OF CONTRACTS § 45, comment *b* at 54 (1932). This subsidiary promise was necessarily implied in the subcontractor's offer because: "[r]easonable reliance resulting in a foreseeable prejudicial change in position affords a compelling basis . . . for implying a subsidiary promise not to revoke an offer for a bilateral contract." 51 Cal. 2d at 414, 333 P.2d at 760.

It should be noted that under the Second Restatement the court would have been able to take a more direct approach. New section 89B provides in part:

> (2) An offer which the offeror should reasonably expect to induce action or forbearance of a substantial character on the part of the offeree before acceptance and which does induce such action or forbearance is binding as an option contract to the extent necessary to avoid injustice.

RESTATEMENT (SECOND) OF CONTRACTS § 89B (Tent. Draft No. 2, 1965). *See also id.* § 89B, illustration 6.

[14] Actual recovery for the general contractor in *Drennan* was damages measured by the difference between the defendant-subcontractor's bid price and the actual cost for the subcontract work.

[15] It seems clear that the real object of the court in *Drennan* was to make promissory estoppel applicable in a commercial context, albeit by a circuitous route, and in effect to overrule *Baird*.

This expansion of section 90 is significant in light of other developments in the application of that doctrine to such areas as pre-agreement negotiations, *see, e.g.*, Hoffman v. Red Owl Stores, Inc., 26 Wis. 2d 683, 133 N.W.2d 267 (1965); employment relation contracts, *see, e.g.*, Thomson v. International Alliance of Stage Employes, 232 Cal. App. 2d 446, 42 Cal. Rptr. 785 (1965); Pitts v. McGraw-Edison Co., 329 F.2d 412 (6th Cir. 1964); and the production of goods, *see, e.g.*, Haveg Corp. v. Guyer, 226 A.2d 231 (Del. 1967). *See generally* Henderson, *Promissory Estoppel and Traditional Contract Doctrine*, 78 YALE L.J. 343 (1969) [hereinafter cited as Henderson].

However, Justice Traynor's application of the theory in *Drennan* is not so sweeping an application of section 90 as it may seem at first glance. In reality, the effect of *Drennan* is to keep an offer open for a reasonable time after the general contract is awarded. If the general delays his acceptance or reopens negotiations he will not be able to bind the subcontractor.

Most of the cases—like *Baird* and *Drennan*—which form the body of law governing subcontract bidding deal with a mistake in the bidding process.[18] The most common factual situation is that of a computational error by the subcontractor and the subsequent revocation of his bid. Many courts have chosen to deal with this problem in traditional contract terms. Unless the subcontractor has specifically made his offer "firm,"[19] the withdrawal of his bid prior to the formal acceptance by the general operates as an effective revocation and frees the subcontractor from any liability on the proposed contract. However, it is clear that in many cases the general is put in an unfair position by this result. That is, the general is committed to the prime contract but has no subcontractor to perform at the sub-bid price he relied upon in the preparation of his own estimate.[20] This problem has been alleviated through the application of promissory estoppel by the *Drennan* court.

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[16] Several states have adopted the *Drennan* doctrine. *See, e.g.*, C.H. Leavell & Co. v. Grafe & Associates, Inc., 90 Idaho 502, 414 P.2d 873 (1966); E.A. Coronis Associates v. M. Gordon Constr. Co., 90 N.J. Super. 69, 216 A.2d 246 (1966); Hoffman v. Red Owl Stores, Inc., 26 Wis. 2d 683, 133 N.W.2d 267 (1965); Union Tank Car Co. v. Wheat Bros., 15 Utah 2d 101, 387 P.2d 1000 (1964); Reynolds v. Texarkana Constr. Co., 237 Ark. 583, 374 S.W.2d 818 (1964).

[17] Prices in the subcontract construction industry, particularly within the mechanical specialty field, can vary greatly. *See* Schultz, *supra* note 11, at 269 n.95. *See, e.g.*, Richards Constr. Co. v. Air Conditioning Co., 318 F.2d 410 (9th Cir. 1963).

[18] *See, e.g.*, Southeastern Sales & Service Co. v. T.T. Watson, Inc., 172 So. 2d 239 (Fla. 1965); N. Litterio & Co. v. Glassman Constr. Co., 319 F.2d 736 (D.C. Cir. 1963); Brunzell Constr. Co. v. G.J. Weisbrod, Inc., 134 Cal. App. 2d 278, 285 P.2d 989 (1955).

[19] The term refers to an offer which contains an assurance against revocation within a reasonable time. *See* Sharp, *Pacta Sunt Servanda*, 41 COLUM. L. REV. 783, 793 (1941).

[20] This would generally occur in the context of rising prices for the type of

A separate problem in the subcontract bidding process is the *intentional* bid withdrawal by the subcontractor.[21] However, the *Drennan* rationale can apply to an intentional withdrawal as well as to a withdrawal prompted by a mistake in the bidding process.[22]

When neither general nor subcontractor had engaged in the commercially detrimental practices of bid shopping and peddling, judicial focus on the issue of a mistake in the bidding process was adequate. However, the widespread existence of these practices necessitates a different focus by the courts, one which is sensitive both to the individual needs of the parties and to the need for a more stable commercial environment.

III. BID SHOPPING AND PEDDLING

One of the principle results of the *Baird/Drennan* approach to subcontract bidding has been the development of "bid shopping" and "bid peddling" practices. Bid shopping is the use by the general of one subcontractor's low bid as a tool in negotiating lower bids from other subcontractors. Bid peddling, conversely, is the practice whereby subcontractors attempt to undercut known bid prices of other subcontractors in order to get a job.[23] In most circumstances, bid peddling is simply a response of competing subcontractors to the bid shopping activity of a general, and insofar as a solution to this problem is concerned, bid shopping and peddling may be treated as one.

Bid shopping and peddling have long been recognized as unethical by construction trade organizations.[24] These "unethical,"

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subcontract services offered. If the subcontractor is allowed to repudiate his bid, the general will be forced to pay another subcontractor a higher price and therefore will suffer a reduction in his margin of profit. *See* text accompanying notes 11-12 *supra*.

[21] Intentional bid withdrawals often occur in those areas of the subcontract construction industry where rapid price fluctuations make a subcontractor's offer obsolete very quickly.

[22] Several courts have adopted the *Drennan* rationale and applied it to intentional bid withdrawals. *See, e.g.*, E.A. Coronis Associates v. M. Gordon Constr. Co., 90 N.J. Super. 69, 216 A.2d 246 (1966); Northwestern Eng'r Co. v. Ellerman, 69 S.D. 397, 408, 10 N.W.2d 879, 883 (1943). *But see* Tatsch v. Hamilton-Erickson Mfg. Co., 76 N.M. 729, 418 P.2d 187 (1966), where the court, applying the *Baird* rationale, refused to hold a subcontractor liable for an intentionally withdrawn bid.

[23] These practices are more fully defined in H.R. REP. No. 434, 84th Cong., 1st Sess. 6 (1955); REPORT OF THE FEDERAL TRADE COMMISSION, dated May 20, 1952, in *Hearings on S. 2097 Before a Subcomm. of the Senate Comm. on the Judiciary*, 82d Cong., 2d Sess. 274-75 (1952). *See also* NAT'L ELEC. CONTRACTORS' ASS'N, REPORT OF LEGISLATIVE COMMITTEE, October 29, 1945.

[24] *See, e.g.*, AMERICAN INSTITUTE OF ARCHITECTS, HANDBOOK OF ARCHITECTURAL PRACTICE, Bk. III, p. 702 (1958); CODE OF ETHICS OF THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, § 3 (1964).

but common, practices have several detrimental results. First, as bid shopping becomes common within a particular trade, the subcontractors will pad their initial bids in order to make further reductions during post-award negotiations. This artificial inflation of subcontractor's offers makes the bidding process less effective.[25] Second, subcontractors who are forced into post-award negotiations with the general often must reduce their sub-bids in order to avoid losing the award. Thus, they will be faced with a Hobson's choice between doing the job at a loss or doing a less than adequate job.[26] Third, bid shopping and peddling tend to increase the risk of loss of the time and money used in preparing a bid. This occurs because generals and subcontractors who engage in these practices use, without expense, the bid estimates prepared by others.[27] Fourth, it is often impossible for a general to obtain bids far enough in advance to have sufficient time to properly prepare his own bid because of the practice, common among many subcontractors, of holding sub-bids until the last possible moment in order to avoid pre-award bid shopping by the general.[28] Fifth, many subcontractors refuse to submit bids for jobs on which they expect bid shopping. As a result, competition is reduced, and, consequently, construction prices are increased.[29] Sixth, any price reductions gained through the use of post-award bid shopping by the general will be of no benefit to the awarding authority, to whom these price reductions would normally accrue as a result of open competition before the award of the prime contract. Free competition in an open market is therefore perverted because of the use of post-award bid shopping.[30]

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[25] *See* Ring Constr. Corp. v. Secretary of War, 8 T.C. 1070, 1089 (1947); H.R. Rep. No. 434, 85th Cong., 1st Sess. 5 (1957). In testimony before congressional committees considering a Federal Construction Contract Procedures Act, an act seeking to end post-award negotiations, one notes the curious circularity of the bid shopping problem. In opposition to the act, general contractors have argued for the necessity of post-award negotiations to deflate subcontractor's bids which are inflated because of such negotiations. *Hearings on S. 2907 Before a Subcomm. of the Senate Comm. on the Judiciary*, 82d Cong., 2d Sess. 173-75 (1952).

[26] *See, e.g.,* Ring Constr. Corp. v. Secretary of War, 8 T.C. 1070, 1075-76 (1947).

[27] For mechanical specialty subcontractors (*see* note 62 *infra*) this risk is great because "estimating with regard to these specialties is an expensive process, requiring highly trained technicians to estimate the cost of various mechanical specialty work. This expensive process, however, is not the case in calculating and assembling the cost of brickwork, plastering, excavation, etc. each of which can be figured accurately on a mathematical basis." H.R. Rep. No. 434, 85th Cong., 1st Sess. 10 (1957).

[28] *Hearings on S. 1644 Before the Subcomm. of the Senate Comm. on the Judiciary*, 84th Cong., 1st Sess. 80-112 (1955).

[29] The perversion of the free market system noticed in the fifth and sixth items of the text has been strongly urged as a reason to end bid shopping and peddling by proponents of a Federal Construction Contract Act. H.R. Rep. No. 434, 85th Cong., 1st Sess. 5 (1957); S. Rep. No. 1119, 84th Cong., 2d Sess. 3 (1955); H.R. Rep. No. 892, 83d Cong., 1st Sess. 4 (1953); S. Rep. No. 448, 83d Cong., 1st Sess. 2 (1953). *See* text accompanying notes 61-63 *infra*.

It is necessary to distinguish between bid shopping and peddling that takes place after the prime contract has been awarded and that engaged in prior to the award. *Pre-award* bid shopping is a form of free competition in an open market. Generals competing for the prime contract will seek the lowest possible sub-bids. In practice, however, the often superior bargaining position of the general makes these negotiations unfair.[31] Yet, the harmful effects of pre-award bid shopping are not extensive.[32]

In the case of *post-award* bid shopping, however, the detrimental effects are more pervasive. Here the negotiations take place in a market completely controlled by the general who has been awarded the prime contract; post-award bid shopping is therefore much less like free competition. Moreover, any reduction in the sub-bid will be to the detriment of both the subcontractor and the

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[30] *See, e.g.*, Ring Constr. Corp. v. Secretary of War, 8 T.C. 1070, 1076 (1947).

Subcontractors are faced with the prospect of cutthroat competition resulting in the ruin of many subcontractors, and loss in profits to others. Generals are often injured by some of the practices of subcontractors—such as last minute submission of bids—taken in response to bid shopping. Furthermore, a general who does not engage in bid shopping is at a competitive disadvantage against those who do. That is, a shopping general may include a smaller percentage of profit in his bid and thereby underbid the non-shopping general with the expectation of regaining this profit loss by shopping for lower sub-bids after the award of the prime contract. The extent and success of this tactic will depend upon the percentage of subcontract bids in the total price of the general contract. The percentage can vary greatly from industry to industry. In some cases the percentage is high; the general contractor is little more than an overseer who has subcontracted out much of the work. Post-award bid shopping is in that case a potentially lucrative source of additional profit.

The party who invariably loses in a post-award bid shopping situation is the awarding authority. When bid shopping is used by the general after the award of the prime contract, the awarding authority is faced with the possibility of poor workmanship, because subcontractors who are forced to reduce their price may rely on inferior quality methods and materials in order to reap some profit.

[31] *See* Schultz, *supra* note 11, at 270. By disclosing the bid of one subcontractor to others in an attempt to obtain lower bids from them, the general is using his superior position to an unfair advantage, both in terms of relative size and in terms of the general's role as the holder of a bid prepared at the cost of another potential subcontractor. Subcontractors will still feel a profit squeeze, impairing their incentive and ability to perform to their best capacity. Southern California Acoustics v. C.V. Holder, Inc., 71 Cal. 2d 719, 726 n.7, 456 P.2d 975, 981 n.7, 79 Cal. Rptr. 319, 325 n.7 (1969).

[32] The subcontractor is not as greatly injured as he is in the case of post-award negotiations where he has relied to his detriment upon the expectation of being awarded a contract. Furthermore, when the bid shopping takes place before the award of the prime contract the general's intent is to lower his prime bid in order to win the contract. Therefore, any reduction in the sub-bid price will be reflected in the general's bid; the awarding authority will benefit from these negotiations.

Section 2-205 of the Code[60] is based upon what the authors felt was established business practice.[61] By making all offers firm, that section arguably eliminates the necessity for a showing of reasonable reliance by the offeror to bind the offeree.[62] Furthermore, it has been proposed that section 2-206 of the Code, by allowing acceptance "in any manner and by any medium reasonable in the circumstances,"[63] would place the point of reasonable acceptance in the construction industry at the time when the general submits his prime bid containing the subcontractor's offer.[64] By binding both parties when the general uses the subcontractor's bid, post-award bid shopping practices would be eliminated. At the same time, the awarding authority would get a better price for its job, for now the competition would all occur before the prime contract has been awarded.

In the abstract this approach seems to offer a possible solution to the bidding problems of the construction industry. However, the proposition that the Code places the time of acceptance of a subcontractor's offer at the moment of use of the subcontractor's bid by the general requires a very strained reading of these Code sections. Article 2 of the Code, by its own terms, applies only to transactions in "goods."[65] Since very few construction contracts fit this definition but rather deal only with "services," any application

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bei nichtigen oder nicht zur Perfektion gelangten Vertragen, 4 Jahrbucher Fur Die Dogmatik Des Heutigen Romischen Und Deutschen Privatrechts 1 (1861). That doctrine advances the theory that contracting parties are under a contractual duty to deal in good faith with each other during the negotiation stage or else face liability to the extent of reliance by the wronged party. French law, while not so advanced on this point, also is free of the restraints placed on the common law by the bargain principle. *See* Kessler & Fine, *Culpa in Contrahendo, Bargaining in Good Faith, and Freedom of Contract: A Comparative Study*, 77 Harv. L. Rev. 401 (1964). *See also* 1 Williston, *supra*, note 4, at § 61A. It is interesting to compare the different approaches to this problem in the context of the emergence of the reliance principle as an alternative method (to the traditional bargained for consideration) of fixing contractual responsibility. *See* Henderson, *supra* note 15.

[60] "An offer by a merchant to buy or sell goods in a signed writing which by its terms gives assurance that it will be held open is not revocable, for lack of consideration, during the time stated or if no time is stated for a reasonable time, but in no event may such period of irrevocability exceed three months; but any such term of assurance on a form supplied by the offeree must be separately signed by the offeror." Uniform Commercial Code § 2-205.

[61] *See* Corbin, *The Uniform Commercial Code—Sales; Should It Be Enacted?*, 59 Yale L.J. 821 (1950).

[62] If only this provision were to become the law in the bidding process it would operate to further decrease the bargaining position of the subcontractor. *See* Note, *The Uniform Commercial Code as a Premise for Judicial Reasoning*, 65 Colum. L. Rev. 880, 889 (1965).

[63] Uniform Commercial Code § 2-206(1)(a).

[64] *Once Around the Flag Pole*, *supra* note 48, at 835.

[65] Uniform Commercial Code § 2-102.

of the Code to this area must be effected through judicial reasoning by analogy.[56] While the proponents of the Code intended it to be ultimately embodied in the general law,[57] the firm offer sections have as yet had little application outside the area of sales.[58] Moreover, section 2-205 only applies to offers "in a signed writing" and therefore is rather limited in its application to construction bidding where written offers are not always common practice.[59] Most importantly, an interpretation of Article 2 that a contract is always formed when a general submits his bid arguably lacks the flexibility necessary in a modern and widely divergent commercial context in which trade practices vary greatly from one section of the industry to another.[60]

D. *Federal and State Legislation*

Since, in most cases, the general contractor does not need to procure sub-bids for work other than that within the mechanical specialty field,[61] it is primarily within this subcontracting area that bid shopping problems arise.[62] Consequently, mechanical specialty contractors have continually advocated legislative action to eliminate these practices. In the United States Congress, mechanical specialty contractors' associations have supported the Federal Construction Contract Act and the Federal Construction Contract Procedure Act as a means of reducing bid shopping and peddling.[63] Various forms of these bills were introduced into Congress as early as 1932. They have always been vigorously opposed by general contractors associations and have never managed to gain congressional approval.

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[56] "'Goods' means all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities (Article 8) and things in action. . . ." UNIFORM COMMERCIAL CODE § 2-105(1). In many cases there is no sale of goods at all involved in a construction subcontract. Frequently, however, the subcontractor supplies the materials he will use on the job. In this sense an argument could be made that the subcontractor is selling "goods" under the UCC definition. However, since the essence of a construction subcontract is clearly one of service, such a result is unlikely. *See* William H. Wise & Co. v. Rand McNally & Co., 195 F. Supp. 621 (S.D.N.Y. 1961); Note, *The Uniform Commercial Code as a Premise for Judicial Reasoning*, 65 COLUM. L. REV. 880 (1965).

[57] UNIFORM COMMERCIAL CODE § 1-102, Comment 1; Corbin, *supra* note 51. *See also* Vold, *Construing the Uniform Commercial Code: Its Own Twin Keys: Uniformity and Growth*, 50 CORNELL L.Q. 49 (1964).

[58] *See, e.g.*, E.A. Coronis Associates v. M. Gordon Constr. Co., 90 N.J. Super. 69, 216 A.2d 246 (1966). *See also* Wilmington Trust Co. v. Coulter, 41 Del. Ch. 548, 200 A.2d 441 (1964).

[59] *See* Note, *Another Look at Construction Bidding and Contracts at Formation*, 53 VA. L. REV. 1720, 1729 (1967).

[60] It has been argued that the Code allows for flexibility in this area by allowing a contract to be formed with open terms. *Once Around the Flag Pole*, *supra* note 48, at 837; UNIFORM COMMERCIAL CODE § 2-305(1), 2-311(1). However, this provision is infrequently used. *See* Schultz, *supra* note 11, at 284. *See also* Air Tech Corp. v. General Elec. Co., 347 Mass. 613, 199 N.E.2d 538 (1964).

[61] S. REP. No. 617, Federal Construction Contract Act, 84th Cong., 1st Sess. 10 (1955).

[62] "Mechanical specialty" subcontracting refers, in general, to such fields as plumbing, heating, piping, air conditioning, and all types of electrical work. *See* S. 1644, 84th Cong., 2d Sess. § 3(3) (1956).

In comparison, several states have enacted legislation requiring prime contractors to list the names and work to be performed by their subcontractors when bidding on public construction contracts.[64] These statutes act to reduce the amount of post-award bid shopping to a limited degree because the consent of the awarding authority is required for any change in the listed subcontractor.[65] However, it has been held that these statutes confer no legal rights on the listed subcontractors. In *Klose v. Sequoia Union High School District*[66] the relevant sections of the California Government Code[67] were interpreted as not being "aimed at conferring rights on the subcontractors, but [were] all aimed at protecting the public and the awarding authority."[68]

E. *Legislative Reform and a New Focus*

On August 5, 1969, the California Supreme Court, the same court that decided *Drennan*, changed the rule established by *Klose* and evidenced a change in judicial focus in *Southern California Acoustics v. C. V. Holder, Inc.*[69] The facts in *Acoustics* were characteristic of the bid shopping problem.[70] The Acoustics company (the subcontractor) brought an action for damages against Holder (the general) and the school district (the awarding authority) incurred because Acoustics relied upon being awarded the subcontract after Holder used its bid and was awarded the prime contract.

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[63] S. Rep. No. 617, 84th Cong., 1st Sess. (1955); H.R. Rep. No. 434, 85th Cong., 1st Sess. (1957).

[64] *See, e.g.*, Cal. Gov't Code § 4104 (West 1966); Mass. Ann. Laws ch. 149, §§ 44A-E (1969); N.J. Ann. Stat. § 52:32-2 (1969); N.Y. State Fin. Law § 135 (McKinney 1940).

[65] *See, e.g.*, Cal. Gov't Code § 4107 (West Supp. 1969).

[66] 118 Cal. App. 2d 636, 258 P.2d 515 (1953).

[67] Cal. Gov't Code § 4104 (West Supp. 1969).

[68] 118 Cal. App. 2d at 641, 258 P.2d at 518.

[69] Cal. 2d 719, 456 P.2d 975, 79 Cal. Rptr. 319 (1969).

[70] Southern California Acoustics, a licensed specialty subcontractor, submitted a telephonic bid for the furnishing and installation of acoustical tile in a school to be built for the awarding authority. C.V. Holder submitted its bid for the prime contract listing plaintiff, as required by law, as the acoustical tile subcontractor. Holder was awarded the prime contract and executed a written contract with the awarding authority. A local trade newspaper reported that Holder had been awarded the job and included in its report the names of the subcontractors listed in Holder's bid. The Acoustics company, after reading the report, and acting on the assumption that its bid had been accepted, refrained from bidding on any other jobs so as to remain within its bonding limits. The general requested and was granted the school district's permission to substitute another subcontractor for the Acoustics company. Although it is unclear from the trial record, the court stated that the plaintiff had apparently been listed inadvertently in the bid in place of the desired subcontractor. The Acoustics

The court of appeals affirmed dismissal of the complaint in reliance on the *Klose* decision.[71] Unlike *Drennan*, where the general was trying to hold the subcontractor to a bid, here, the issue was whether a subcontractor could justifiably rely on the use of its bid by a prime contractor and thereby bind the general.

The supreme court, on traditional "offer and acceptance" grounds, predictably rejected any argument as to the existence of a contract between Holder and the Acoustics company.[72] Furthermore, the court rejected Acoustics' claim that reliance on Holder's use of its bid and Holder's failure to promptly reject its offer made the doctrine of promissory estoppel applicable. The Acoustics company had not relied, said the court, on any implied promise by the Holder company, but instead only on a listing of subcontractors required by law.[73] Thus, unlike *Drennan*, the court found no subsidiary promise and therefore no basis for the application of promissory estoppel.[74]

Even though rejecting the subcontractor's attempt to apply the *Drennan* doctrine in reverse, the court was still able to find for the plaintiff. In 1963, the California legislature had adopted the Subletting and Subcontracting Fair Practices Act.[75] Prior to the passage of this act in 1963, it was settled by *Klose* that the provisions of the Government Code which required the listing of subcontractors on public construction contracts conferred no rights on those companies listed. But the 1963 amendments to the Government Code were interpreted by the court in *Acoustics* as eliminating both of the grounds for denying relief in *Klose*. The preamble of the 1963 Act stated that the purpose of the Act was to end bid shopping practices and protect subcontractors;[76] such a state-

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company first sought a writ of mandamus to compel the school district to rescind its contract with Holder and, having lost on demurrer, brought another action for damages against Holder and the school district. *Id.*

[71] Southern California Acoustics v. C.V. Holder, Inc., 70 Cal. Rptr. 309 (2d Dist. 1968), *vacated*, 71 Cal. 2d 719, 456 P.2d 975, 79 Cal. Rptr. 319 (1969).

[72] The court held to the *Klose* view that the listing of a subcontractor in response to a statutory command cannot be construed as an expression of acceptance.

[73] 71 Cal. 2d at 723, 456 P.2d at 979, 79 Cal. Rptr. at 323. *See* Drennan v. Star Paving Co., 51 Cal. 2d 409, 414, 333 P.2d 757, 760 (1958). *See also* text accompanying notes 12-14 *supra*.

[74] *See* text accompanying notes 13-14 *supra*.

[75] Ch. 2125, §§ 1-14 [1963] Cal. Stats. 4410-14, amending and renumbering sections 4100-08 of the Government Code.

[76] "The legislature finds that the practices of bid shopping and bid peddling

awarding authority. The price on the overall contract having already been set, the general's purpose here is simply to drive down his own cost, increasing his profit at the expense of the subcontractor.[33]

It is clear that contract is a legal device primarily designed to support the market system.[34] Yet in the area of subcontract bidding, the law of contract has, in reality, perverted the market system. By allowing, and indeed fostering, the practice of bid shopping, particularly after the award of the prime contract, the efficiency of the bidding system as a means of market competition is greatly reduced. Instead of supporting market institutions in order to promote general economic welfare,[35] the law regulating subcontract bidding has in fact inhibited market functioning.

IV. ATTEMPTS AT ENDING BID SHOPPING AND PEDDLING

Because of the undesirability of bid shopping and peddling there have been several varied attempts to mitigate their effects upon the subcontract bidding process. Common to all the proposed solutions, however, has been their relative ineffectiveness.[36]

A. *General Industrial Reform*

There have been some attempts within the industry itself to curb such unfair bidding practices.[37] These intra-industry attempts have been directed primarily at the prevention of bid shopping through the formation of canons of ethical practice and the persuasion of association members to abide by these canons. Such attempts have been, however, largely futile. Ethics in the construction industry are, it would appear, situational at best. Any attempt to penalize violations of these codes of ethics may restrict price competition and be an unlawful restraint of trade.[38] Other proposals by the construction trade associations which would alleviate such problems as last minute bids,[39] deliberate vagueness in bidding,[40] and uncertainty as to which subcontractor's bid was used,[41] have little effect upon bid shopping itself because they treat the effects but ignore the causes of that detrimental practice.

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[33] Southern California Acoustics v. C.V. Holder, Inc., 71 Cal. 2d 719, 726 n.7, 456 P.2d 975, 981 n.7, 79 Cal. Rptr. 319, 325 n.7 (1969).

[34] Contract law is often said to reflect the fundamental societal goal of the achievement of the best possible balance between economic freedom and order. *See* Knight, *Economic Objectives in a Changing World*, ECONOMICS AND PUBLIC POLICY 49 (1955); Macaulay, *Justice Traynor and the Law of Contracts*, 13 STAN. L. REV. 812 (1961).

[35] *See* F. KESSLER & M. SHARP, CONTRACTS: CASES AND MATERIALS 1-9 (1953).

[36] It has, for instance, been suggested that the bid shopping problem in construction bidding can only be solved if *Drennan* is discarded and courts return to the traditional approach of *Baird*. Note, *Construction Contracts—The Problem of Offer and Acceptance in the General Contractor-Subcontractor Relationship*, 37 U. CIN. L. REV. 798 (1968). While this would end the seeming inequity of a unilaterally bound subcontractor, it is not a desirable solution. This argument, like much of the discussion in this area of the law, focuses attention on the wrong issue. Removing the protection which *Drennan* afforded the general against unethical subcontractors would not eliminate—although in some situations it would act to reduce—the bid shopping problem and would once again leave generals unprotected. Instead of focusing on such issues as "mutuality," courts should look at the bid shopping problem in the context of normal business activities.

[37] These practices have long been considered unethical by many trade associations. *See, e.g.*, note 24 *supra*.

B. *Bid Depositories*

The creation of "bid depositories" has been one of the major responses in those fields of the construction industry where bid shopping and peddling has reached great proportions. A bid depository is a facility, usually created and operated by a trade association, for the collection of subcontract bids.[42] The sub-bids for any given job on which bids have been invited are sent to the depository a short time prior to the date set by the general for the opening of bids. The depository keeps the subcontractors' bids closed and confidential until the hour bids are opened by the general, who then makes the bid quotations known to all subcontractors participating in the depository.[43]

Bid depositories have proven, in some cases, to be an effective means of controlling bid shopping. There are, however, some very serious problems involved with their use. A depository, since it regulates bidding practices, is subject to the very broad sanctions of the Sherman Act. Price fixing, bid comparing, and dividing of profits, all clearly potential antitrust violations, are no less so when performed through the vehicle of a bid depository.[44] It seems certain that any unreasonable inhibition of competitive bidding will be held to be a combination in restraint of trade and violative of the Sherman Act.[45] While recent cases have recognized that many of the restraints on competition caused by bid depositories were designed to, and did in fact, eliminate the harmful practice of bid shopping,[46] those decisions have placed restrictions on the sanctions available to bid depositories which greatly limit the utility of those institutions.[47]

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[38] *See* Schueller, *Bid Depositories*, 58 Mich. L. Rev. 497, 502 (1960) [hereinafter cited as Schueller].

[39] *See* Note, *Another Look at Construction Bidding and Contracts at Formation*, 53 Va. L. Rev. 1720, 1745 n.76 (1967).

[40] *See id.* at 1745.

[41] National Joint Cooperative Committee of the Associated General Contractors of America, Incorporated—Council of Mechanical Specialty Contracting Industry Incorporated, Recommended Procedure for Receiving and Handling Sub-Bids for the Construction Building Industry (1960).

[42] It is conceivable that a depository may serve several different trades. In practice, however, each depository usually serves one geographic area and only one subcontracting specialty.

[43] Schueller, *supra* note 38, at 498.

Through the use of bid depositories subcontractors are able to combine their bargaining strength in order to take effective measures against bid shopping. Since the bid quotations are made known to all participating subcontractors, any difference between the awarded sub-bid price and the actual price is likely to be discovered. Upon discovery, the depository will penalize those who have violated the rules against bid shopping. Whether or not members of a bid depository have any legal recourse against a member who violates the rules depends upon the terms of the by-laws. *See* Scott v. Lee, 208 Cal. App. 2d 12, 24 Cal. Rptr. 824 (1962).

C. *The Uniform Commercial Code*

The approach of the Uniform Commercial Code to the sale of goods has been proposed as a possible solution to the bid shopping problem.[48] The Code rejects the common law approach to contract formation in favor of more realistic rules for construing an offer to contract.[49]

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[44] 15 U.S.C. §§ 1, 2 (1964). *See, e.g.*, United States v. Associated Nevada Dairymen, Inc., 1955 Trade Cas. ¶ 68,172 (D. Nev. 1955) (price fixing); United States v. Brooker Eng'r Co., 1940-43 Trade Cas. ¶ 56,183 (E.D. Mich. 1942) (dividing of profits); United States v. Engineering Survey & Audit Co., 1940-43 Trade Cas. ¶ 56,019 (E.D. La. 1940) (comparing of bids).

[45] In the earlier cases, courts abolished the entire depository upon finding some of the practices of a bid depository in violation of the Sherman Act. Later cases, however, have held that the bid depository agreement itself was not a *per se* violation of the Sherman Act even though some of the rules of an agreement did violate the act. *See* United States v. Bakersfield Associated Plumbing Contractors, Inc., 1958 Trade Cas. ¶ 69,087 (S.D. Cal. 1958), 1959 Trade Cas. ¶ 69,266 (S.D. Cal. 1959).

[46] *See* 1958 Trade Cas. ¶ 69,087 at 74,305.

[47] Such sanctions include forbidding subcontractors to submit bids to general contractors who did not use the bid depository. *See* People v. Inland Bid Depository, 233 Cal. App. 2d 851, 44 Cal. Rptr. 206 (1965). *See also* Mechanical Contractors Bid Depository v. Christiansen, 352 F.2d 817 (10th Cir. 1965), *cert. denied*, 384 U.S. 918 (1966). *See generally* Scheuller, *supra* note 38; Ducker, *Bid Depositories Under the Sherman Act*, 45 DENVER L.J. 756 (1968).

[48] Note, *Once Around the Flag Pole: Construction Bidding and Contracts at Formation*, 39 N.Y.U.L. REV. 816 (1964) [hereinafter cited as *Once Around the Flag Pole*]; Uniform Commercial Code Commentary, *Contract Formation and the Law of Warranty: A Broader Use of the Code*, 8 B.C. IND. & COMM. L. REV. 81 (1966). *See also* Llewellyn, *On Our Case-Law of Contracts: Offer and Acceptance* (Pt. 1), 48 YALE L.J. 1 (1938).

[49] UNIFORM COMMERCIAL CODE §§ 2-204, 2-206.

Civil law countries have, for some time, used a very different approach to the firm offer problem. German law, in keeping with its doctrine of *culpa in contrahendo*, holds that an offer, once communicated, is binding, unless the offeror has given fair warning to the offeree that the offer will not bind him. At the same time, however, the risk of loss or delay of acceptance is placed upon the offeree, and the offer lapses if there is no timely acceptance. The doctrine of *culpa in contrahendo* was first promulgated in 1861 in an article by Jhering. Jhering, *Culpa in Contrahendo, oder Schandensersats* ment of legislative intent contradicted the *Klose* holding that the only aim of those sections was to provide an opportunity to the awarding authority for investigation and approval of any subcontractors. Furthermore, the amendments revised the section dealing with substitution of subcontractors.[77] That section would now allow for substitution only in those specific circumstances in which the listed subcontractor was unwilling or unable to perform.[78] Thus, no substitution would be allowed in the case where the general had shopped for a lower sub-bid after the award of the prime contract. Accordingly, the court held the *Klose* decision to be no longer viable and these sections of the Government Code to confer the right on the listed subcontractor to perform the contract unless valid statutory grounds for substitution exist.

Acoustics effectively eliminates the practice of post-award bid shopping in California's public construction jobs;[79] but the decision is inapplicable to other than *public* bidding situations. Furthermore, since the decision is based upon an interpretation of a section of the California Government Code, it will probably carry little weight as precedent in other jurisdictions. The listing statutes of other states more closely resemble the old California statute—interpreted by *Klose* to confer no rights on the listed subcontractor—rather than the statute relied upon by the court in *Acoustics* under which a finding of legislative purpose to end bid shopping is relatively easy.[80]

Despite the recovery afforded the plaintiff-subcontractor, the court in *Acoustics* did not fashion a viable general solution to the bid shopping problem. If this detrimental practice is to be effectively dealt with, it is necessary that the courts recognize bid shopping and peddling as an issue apart from traditional contract

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in connection with the construction, alteration, and repair of public improvements often result in poor quality of material and workmanship to the detriment of the public, deprive the public of the full benefits of fair competition among prime contractors and subcontractors, and lead to insolvencies, loss of wages to employees, and other evils." CAL. GOV'T CODE § 4101 (West Supp. 1969).

[77] Former section 4104 was amended and renumbered section 4107.

[78] The court found significant the fact that all of the situations of subcontractor substitution listed by the court in *Klose* as necessary to efficient construction of public facilities were now covered by the amended statute. 71 Cal. 2d at 726 n.8, 456 P.2d at 975 n.8, 79 Cal. Rptr. at 319 n.8.

[79] It is post-award bid shopping that was of major concern to the court. The effects of post-award bid shopping are more serious than those of pre-award bid shopping. *See* text accompanying notes 31-33 *supra*.

[80] The listing statutes of the other states, like the old California statute, are aimed at giving the awarding authority the opportunity to confirm the capability of subcontractors to perform work on the job. The California legislature is the only one which has professed any purpose of protecting the subcontractor from shopping generals.

formation (*Baird*) or detrimental reliance by generals on reneging subcontractor's bids (*Drennan*). In a sense, however, *Acoustics* may be a step in that direction. For even though the factual circumstances in *Acoustics* were not unlike those in *Baird* and *Drennan*,[81] the *Acoustics* court focused upon the problem of bid shopping and not upon the issues of contract formation. That focus, when more generally made by courts, and when followed to its logical conclusion, is the key to the elimination of detrimental bid shopping practices.

V. PROMISSORY ESTOPPEL—A PROPOSED SOLUTION

Once a court has focused on bid shopping and peddling as an authentic and separate issue in the subcontract bidding situation, it should be able to work a practicable solution to this problem. Promissory estoppel, extended beyond *Drennan*, could be used as a tool to effectively inhibit bid shopping practices.

In *Acoustics*, the court rejected the subcontractor's argument that section 90 should be applied in a *Drennan*-like manner to bind the general.[82] It would seem that a more realistic approach, openly applying the reliance principle to a bargain situation, would have enabled the court to use the promissory estoppel doctrine.[83]

In order for promissory estoppel to be applicable, all the requirements of section 90 must be met.[84] Thus, there must be a promise that was relied upon.[85] In *Drennan*, the court found the prerequisite promise implicit in the subcontractor's bid, and that this subsidiary promise not to revoke the sub-bid was necessarily implied[56] in order "to preclude the injustice that would result if the offer could be revoked after the offeree had acted in detrimental reliance thereon."[57] In *Acoustics*, however, the court refused to find an analogous subsidiary promise by the general because the subcontractor had failed "to allege facts showing the existence of any promise by [the general] . . . upon which [the subcontractor] had detrimentally relied."[58] This finding of an implied promise to award the contract to the subcontractor whose bid was used in preparing the estimate which won the prime contract is crucial to an application of promissory estoppel. Such a promise should be implied in many cases—to paraphrase *Drennan*—to preclude the injustice that would result if the general contractor could use the bid of the subcontractor in winning the prime contract and then be permitted to shop for lower sub-bids. Once that promise has been implied, the issue would then be whether or not the promisor (general) should reasonably expect its implied promise to induce reliance on the part of the promisee (subcontractor). This would be a factual determination depending upon the circumstances of the particular case and the common practices within the trade. This solution allows for a great deal more flexibility than those previously proposed.[59] A general contractor would not be bound to a subcontractor in every instance where he used that subcontractor's bid. That result is unnecessarily broad, too greatly limiting the general's freedom to contract.[60] Rather, only in those circumstances where the general has engaged in post-award bid shopping, and where there is evidence of detrimental reliance by the subcontractor, will the

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[81] *Acoustics*, like *Baird* and *Drennan*, arose in the context of an error in the bidding process.

[82] 71 Cal. 2d at 723-24, 456 P.2d at 979, 79 Cal. Rptr. at 323.

[83] *See* Henderson, *supra* note 15.

[84] "A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires." RESTATEMENT (SECOND) OF CONTRACTS § 90 (Tent. Draft No. 2, 1965). This provision reflects a change from the original Restatement provision which made a finding of injustice a threshold question; given such a finding, the court would apply the estoppel. The Second Restatement allows for partial enforcement of a contract as justice requires. Partly as a result of that change, the requirement that the action or forbearance have a "definite and substantial character" has also been deleted. *See generally* Boyer, *Promissory Estoppel: Requirements and Limitations of the Doctrine*, 98 U. PA. L. REV. 459 (1950).

All elements of section 90 (promise; reasonable expectation by the promisor of reliance by the promisee; reliance in fact by the promisee; and injustice but for enforcement of the promise) must be satisfied before the doctrine can be invoked. *See, e.g.*, E.A. Coronis Associates v. M. Gordon Constr. Co., 90 N.J. Super. 69, 216 A.2d 246 (App. Div. 1966); N. Litterio & Co. v. Glassman Constr. Co., 319 F.2d 736 (D.C. Cir. 1963).

[85] Bard v. Kent, 19 Cal. 2d 449, 122 P.2d 8 (1942). *See also* Hilltop Properties,

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Inc. v. State, 233 Cal. App. 2d 349, 43 Cal. Rptr. 605 (1965); Comment, *supra* note 1, at 1,700.

[56] *See* note 13 & accompanying text *supra*.

[57] Drennan v. Star Paving Co., 51 Cal. 2d at 414, 333 P.2d at 760.

[58] 71 Cal. 2d at 723, 456 P.2d at 979, 79 Cal. Rptr. at 323. The court held that the plaintiff-subcontractor had relied upon the listing of subcontractors as required by section 4104 of the Government Code and not upon any promise from the general.

[59] The Uniform Commercial Code and bid depository approaches previously discussed both suffer from the disadvantage of being overbroad. The Uniform Commercial Code approach binds all generals at the moment they use a subcontractor's bid, irrespective of trade practices and whether or not there has been any bid shopping. The use of bid depositories effectively eliminates both pre-award and post-award bid shopping but does so at the expense of unnecessarily limiting competition. The promissory estoppel approach, while not so effective as an inhibitor of bid shopping, does not suffer from these weaknesses.

[60] The promissory estoppel approach would have no effect on pre-award bid shopping. That practice, however, is less detrimental than post-award bid shopping. *See* text accompanying notes 31-33 *supra*.

doctrine of promissory estoppel be used to bind the general contractor.

In the *Acoustics* case, for example, the subcontractor, upon reading in a trade newspaper that the defendant-general had been awarded the prime contract and assuming that its bid had been accepted, refrained from bidding on other construction jobs in order to remain within its bonding limits. While it is unclear from the case, it may be reasonably inferred that the subcontractor's assumption was based on the common practice in the local acoustical tile subcontracting industry, and was reasonably to be expected by the general.[91] Assuming for the sake of example that the general was not mistaken in his listing of the plaintiff but rather felt it could obtain a lower price by shopping for other sub-bids, promissory estoppel should be applied to bind the general and prevent post-award bid shopping.[92]

In *Williams v. Favret*,[93] the leading case holding that no contractual relationship is created between the subcontractor and the general when the general uses the subcontractor's bid, the application of promissory estoppel would have similarly allowed the court to reach a better result. In that case, Williams, an electrical subcontractor, submitted his bid to Favret who used that estimate in preparing his bid on a federal government contract. When submitting his electrical sub-bid, Williams advised Favret: "If our estimate used wire us collect prior to June 6 or else same is withdrawn." The general, in order to protect himself, answered by telegram: "We used your bid for wiring on barracks and dispensary Gulfport."[94] The bid by Favret was accepted by the government and he was awarded the prime contract. Williams, after learning of the award to the general, ordered supplies and began making arrangements to perform the electrical subcontract. However, after a long delay, Favret, in answer to a letter of inquiry, advised Williams that he had given the work to someone else. On these facts the court held for the defendant relying upon traditional offer and acceptance doctrine.[95] This despite the fact "that Favret, after accepting Williams' bid, shopped around and found he could get someone else to do the work at a lower price."[96] Here, again, is an instance where promissory estoppel should have been applied. It seems clear that it was necessary to find an implied promise to accept the subcontractor's bid in the actions of the general and the common expectations of the trade.[97] The general could not reasonably have believed the subcontractor would not rely on being awarded the electrical subcontract.

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[91] *See generally* Schultz, *supra* note 11. The use of promissory estoppel in this manner is somewhat analogous to the UCC approach previously discussed. *See* text accompanying notes 48-60 *supra*. The UCC approach would hold that reasonable acceptance in the construction industry would be at the moment the general submits his bid containing the subcontractor's offer. This result is too general. It would necessarily bind the parties in all circumstances, even where no bid shopping activities had occurred. The bid shopping problem is a special one and cannot be solved by so general and simple a solution.

[92] If the general could show that the listing of the subcontractor in the trade paper had been inadvertent, the general could attempt to rescind the contract on the basis of mistake.

[93] 161 F.2d 822 (5th Cir. 1947).

[94] *Id.* at 823 n.1.

On the other hand, there are instances where justice would not be done by binding the general to the subcontractor whose bid was relied upon in preparing the prime bid. For instance, in *Klose* there was clear evidence that Basin (the general) had erroneously listed Klose (the subcontractor) in its bid on the prime contract.[98] In fact, the publicly listed figure for the electrical work was not that submitted by Klose but rather that of another subcontractor whose bid was some $500 lower.[99] When the error was discovered, the other subcontractor was substituted for Klose. There was no evidence of any reliance by Klose upon being awarded the subcontract, nor of any bid shopping activities.[100] In these circumstances the application of promissory estoppel to bind the general to a subcontractor who had not submitted the lowest sub-bid and who was in fact listed in error would serve no useful purpose.[101] If it had been shown, however, that there had been no mistake, but rather that the general had shopped for lower sub-bids after the award of the prime contract, the result should be different. In such a case, the court should carefully examine the facts for any justifiable reliance (*i.e.* ordering of supplies, turning down of other jobs, hiring of extra workers, etc.) upon which to base an application of promissory estoppel to bind the general and prevent him from gaining the fruits of his detrimental bid shopping.

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[95] *Id.* at 824 (dissenting opinion).

[96] *Id.* at 824-25 (dissenting opinion).

[97] *See id.* at 824.

[98] 118 Cal. App. 2d 636, 638, 258 P.2d 515, 516 (1953).

[99] *Id.*

[100] *Id.* If the circumstances were such that listing the subcontractor was the result of an error, but the subcontractor *had* relied upon that listing in anticipation of being awarded the contract, the case would be more difficult. Under present law the subcontractor would simply have to bear the cost of his reliance, no contract yet in existence. Under the promissory estoppel approach offered here the result would be the same, no bid shopping having taken place. Any discussion of the equities involved and the proper allocation of the burden of risk in this situation is beyond the scope of this Comment.

[101] That would, in fact, be the result in a public construction job under the *Acoustics* rationale. *See* text accompanying notes 75-78 *supra*.

By this flexible application of the promissory estoppel doctrine to the subcontract bidding situation courts would be able to effectively inhibit post-award bid shopping practices while at the same time allowing for other approaches, such as those used in the traditional line of cases, in non-shopping situations.

VI. CONCLUSION

The commercially detrimental practice of bid shopping and peddling has been engendered, in part, by judicial decisions made in a vacuum. By creating the law which governs subcontract bidding in the context of cases involving a mistake in the bidding process, courts have formed a legal system inappropriate for more typical industry practices. As a result, bid shopping and peddling have become common in many areas of the subcontract industry. These practices—particularly when in the form of post-award negotiations—have extensive detrimental effects. Courts faced with subcontract bid shopping cases should not rely on the traditional approach formed by *Baird* and *Drennan* but instead should take a realistic look at the problems that exist in the bidding process and fashion practicable solutions to them. The promissory estoppel doctrine can serve as a useful judicial tool in seeking that end.

THOMAS P. LAMBERT

APPENDIX III

Note, Another Look at Construction Bidding and Contracts at Formation, 53 Va. L. Rev. 1720 (1967).

NOTE

ANOTHER LOOK AT CONSTRUCTION BIDDING AND CONTRACTS AT FORMATION

From the time a general contractor (general) receives bids from subcontractors (subs) until he formally accepts one of those bids, the parties are not adequately protected by the common law. Although they are forced by the commercial context to rely upon each other during this period, at common law their relationship cannot be contractual until the general responds with the requisite promise of acceptance. To some extent the promissory estoppel doctrine has alleviated the general's problems by binding the sub to perform according to the terms of his bid. But this protection is one-sided, and despite the view of some courts that promissory estoppel is a panacea, it appears that in confining the scope of protection to the general, the doctrine in fact raises serious problems.

The Uniform Commercial Code (UCC), in its attempt to conform commercial law to business practice, offers new methods of dealing with this recurrent problem. At least one commentator has found in the Code what he believes to be a single and conclusive answer—a contract should arise as soon as the general uses a sub's bid in preparing his own bid for the prime contract. While this answer may be sound theoretically, one apparent danger is that it, like other pervasive answers to complex problems may be no more than an oversimplification.

An empirical examination of the general-sub puzzle, along the lines of Professor Frankelyn Schultz's 1952 survey of Indiana contractors, appears to be the most suitable way both to test the validity of the above "answer" and to find an alternative if that answer proves to be defective. Indeed, in its emphasis upon conforming commercial law to business practice, the UCC seems to dictate that any answer to the problem must be grounded in the facts of the business world. This Note, by examining the practices of over 100 generals and subs in Virginia, suggests an approach to the general-sub puzzle in the context of the UCC's acceptance of "commercial reasonableness" and "trade usage" as relevant factors. While variations in business practice necessarily mean that the particular conclusions reached cannot be applicable in all locations at all times, nevertheless these conclusions illustrate the inadequacy of making determinations in a factual vacuum and illustrate the importance of looking to business reality for a solution to the puzzle.

PRE-UCC

Offers at common law are freely revocable prior to acceptance unless

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supported by some special consideration.[1] This doctrine, however, frequently causes inconvenience for businessmen, who need to be able to predict with certainty the future conduct of those with whom they deal. As a result, several methods of avoiding this uncertainty have developed. Besides the option contract[2] and the sealed promise,[3] some states have adopted written obligation acts, which provide for the enforceability of written promises regardless of consideration.[4]

However, the promissory estoppel doctrine[5] is the most significant means of avoiding the common-law rule in the general-sub context. Under this doctrine the general receives limited protection if he uses the sub's bid to compute his own bid to the awarding authority.[6] Section 90 of the *Restatement of Contracts* defines the doctrine as follows:

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[1] 1 A. Corbin, Contracts § 38 (rev. ed. 1963) [hereinafter cited as Corbin]; G. Grismore, Contracts §§ 30, 32 (rev. ed. 1965) [hereinafter cited as Grismore]; Restatement of Contracts § 41 (1932); 1 S. Williston, Contracts § 55 (3d ed. 1957) [hereinafter cited as Williston].

[2] Corbin § 43; Williston §§ 61, 61A.

[3] Corbin § 252; Williston § 61.

[4] *E.g.*, N.Y. Pers. Prop. Law § 33(5) (McKinney 1962); *see* Braucher, *The Commission and the Law of Contracts*, 40 Cornell L.Q. 696, 701 (1955). *See also* Uniform Commercial Code § 2-205; Corbin, *The Uniform Commercial Code–Sales; Should It Be Enacted?*, 59 Yale L.J. 821, 827-29 (1950). *See generally* Restatement (Second) of Contracts § 89(b), comment *d* at 139–40 (Tent. Draft No. 2, 1965).

[5] Restatement of Contracts § 90 (1932). The *Restatement* does not use the term promissory estoppel. *Cf.* Corbin § 204. The term was introduced by Professor Williston. Williston § 139 (1st ed. 1920); *see* Boyer, *Promissory Estoppel: Requirements and Limitations of the Doctrine*, 98 U. Pa. L. Rev. 459 (1950).

[6] *See* N. Litterio, Inc. v. Glassman Constr. Co., 319 F.2d 736 (D.C. Cir. 1963); Air Conditioning Co. v. Richards Constr. Co., 200 F. Supp. 167 (D. Hawaii 1961), *aff'd*, 318 F.2d 410 (9th Cir. 1963); E.A. Coronis Associates v. M. Gordon Constr. Co., 90 N.J. Super. 69, 216 A.2d 246 (App. Div. 1966); Reynolds v. Texarkana Constr. Co., 237 Ark. 583, 374 S.W.2d 818 (1964); Union Tank Car Co. v. Wheat Bros., 15 Utah 2d 101, 387 P.2d 1000 (1964); Drennan v. Star Paving Co., 51 Cal. 2d 409, 333 P.2d 757 (1958); Harris v. Lillis, 24 So. 2d 689 (La. 1946); Northwestern Eng'r Co. v. Ellerman, 69 S.D. 397, 10 N.W.2d 879 (1943). *But see* James Baird Co. v. Gimbel Bros., 64 F.2d 344 (2d Cir. 1933), where Judge Learned Hand rejected the applicability of the promissory estoppel doctrine to the general-sub relationship. This decision received immediate and severe criticism. *E.g.*, 28 Ill. L. Rev. 419 (1933); 20 Va. L. Rev. 214 (1933). While several other courts have refused to apply promissory estoppel in this context, none has accepted Judge Hand's rationale. *See* Robert Gordon, Inc. v. Ingersoll-Rand Co., 117 F.2d 654 (7th Cir. 1941) (general unable to prove justifiable reliance or irreparable detriment); Tatsch v. Hamilton-Erickson Mfg. Co., 76 N.M. 729, 418 P.2d 187 (1966); Southwestern Sales & Serv. Co. v. T.T. Watson, Inc., 172 So. 2d 239 (Fla. Dist. Ct. App. 1965) (estoppel cannot be predicated on truthful statement of future intent); Hedden v. Lupinsky, 405 Pa. 609, 176 A.2d 406 (1962) (general's letter to sub varied terms of offer and constituted a counter-offer); R.J. Daum Constr. Co. v. Child, 122 Utah 194, 247 P.2d 817 (1952) (general's reply a counter-offer).

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> A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.[7]

Each of these elements must be satisfied before a general can take advantage of the doctrine to hold a sub to the terms of his bid.[8]

Thus a sub's estimate which is clearly not intended as an offer cannot be considered a "promise."[9] Similarly, the sub's bid must actually induce substantial reliance.[10] If the general relies on the sub's bid to compute his own cost of performing the prime contract, this element is satisfied.[11] However, the general loses his protection if he demonstrates his lack of reliance by continuing to bargain with the sub or by failing to reply promptly to the sub's offer.[12] Furthermore, the general is not justified in relying on mistakes in the sub's bid, which are large enough to put him on notice,[13] or mistakes which he has induced himself.[14]

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[7] Modifications of this section are contemplated. RESTATEMENT (SECOND) OF CONTRACTS § 90 (Tent. Draft No. 2, 1965) provides:

> A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.

A proposed section of the new *Restatement* has direct relevance to the construction bidding process. Section 89(b)(2) reads:

> (2) An offer which the offeror should reasonably expect to induce action or forbearance is binding as an option contract to the extent necessary to avoid injustice.

See id. illustration 6, at 142-43. This provision is a restatement of Judge Traynor's holding in Drennan v. Star Paving Co., 51 Cal. 2d 409, 333 P.2d 757 (1958). Although Judge Traynor did not consider the sub's bid an option, he found an implied secondary promise to keep the offer open for a reasonable time. This implied promise became irrevocable once the general relied on it by using it in his bid. *Id.* at 415, 333 P.2d at 760; *see* 47 CALIF. L. REV. 405 (1959); 59 COLUM. L. REV. 355 (1959); 11 STAN. L. REV. 546 (1959).

[8] N. Litterio & Co. v. Glassman Constr. Co., 319 F.2d 736, 739 (D.C. Cir. 1963); E.A. Coronis Associates v. M. Gordon Constr. Co., 90 N.J. Super. 69, 216 A.2d 246 (App. Div. 1966); *see* Boyer, *supra* note 5.

Some courts treat promissory estoppel merely as a replacement for consideration. Porter v. Commissioner, 60 F.2d 673, 675 (2d Cir. 1932) ("species of consideration"); Allegheny College v. National Chautauqua County Bank, 246 N.Y. 369, 159 N.E. 173 (1927); C.H. Leavell & Co. v. Grafe & Associates, 90 Idaho 502, 414 P.2d 873 (1966) (dictum). The preferred approach is to use the doctrine as a flexible device to reach equitable results. Thus in N. Litterio & Co. v. Glassman Constr. Co., *supra*, the court held a sub to the terms of his promise although the general's acceptance had varied the terms of the offer. Rather than relying on technical common-law contract rules, the court used promissory estoppel to reach a sensible result. *See* Hoffman v. Red Owl Stores, Inc., 26 Wis. 2d 683, 133 N.W.2d 267 (1965) (promissory estoppel applied although offer too indefinite to be accepted); Boyer, *supra* note 5, at 482-91. *Contra*, Hedden v. Lupinsky, 405 Pa. 609, 176 A.2d 406 (1962); R.J. Daum Constr. Co. v. Child, 122 Utah 194, 247 P.2d 817 (1952).

[9] Leo F. Piazza Paving Co. v. Bebek & Brkich, 141 Cal. App. 2d 226, 296 P.2d 368 (1956). *See generally* Boyer, *supra* note 5, at 461-79.

[10] Lazarus v. American Motors Corp., 21 Wis. 2d 76, 123 N.W.2d 548 (1963). *See also* Robert Gordon, Inc. v. Ingersoll-Rand Co., 117 F.2d 654 (7th Cir. 1941).

But the critical issue is whether the sub should reasonably have expected the general to rely on his bid, and whether the general's reliance was reasonable.[15] Courts appear to have taken three different approaches in deciding these fundamental issues. Only recently one court stated that a general's reliance upon a sub's bid cannot constitute promissory estoppel.[16] A second, more realistic approach was taken by Judge Traynor in *Drennan v. Star Paving Co.*,[17] when he applied the promissory estoppel doctrine on the basis of what he believed to be normal commercial expectations.[18] But the danger of this approach is that it can freeze the courts into a conclusion which cannot be justified by the facts since no consideration is given to the possibility that practices within the particular trade differ from normal commercial expectations. Finally, some courts have held that these issues should be resolved by examining local custom within the particular trade.[19] For example, in *N. Litterio & Co. v. Glassman Construction*

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[11] *See* N. Litterio & Co. v. Glassman Constr. Co., 319 F.2d 736 (D.C. Cir. 1963); Schultz, *The Firm Offer Puzzle: A Study of Business Practice in the Construction Industry*, 19 U. Chi. L. Rev. 237, 248–49 (1951) [hereinafter cited as Schultz]. *Contra*, Robert Gordon, Inc. v. Ingersoll-Rand Co., 117 F.2d 654 (7th Cir. 1941); R.J. Daum Constr. Co. v. Child, 122 Utah 194, 247 P.2d 817 (1952).

[12] *See* R.J. Daum Constr. Co. v. Child, 122 Utah 194, 247 P.2d 817 (1952); Drennan v. Star Paving Co., 51 Cal. 2d 409, 333 P.2d 757 (1958) (dictum); Schultz at 248–49.

[13] Union Tank Car Co. v. Wheat Bros., 15 Utah 2d 101, 387 P.2d 1000 (1964); *see* Robert Gordon, Inc. v. Ingersoll-Rand Co., 117 F.2d 654 (7th Cir. 1941); Southeastern Sales & Serv. Co. v. T.T. Watson, Inc., 172 So. 2d 239 (Fla. Dist. Ct. App. 1965) (dictum).

[14] Centex Constr. Co. v. James, 374 F.2d 921 (8th Cir. 1967).

[15] Boyer suggests that this objective test is a compromise measure adopted in the face of an intolerable dilemma. To enforce the promise in all cases would be a hardship to the offeror, while to deny enforcement would result in hardship to the offeree. Boyer, *supra* note 5, at 470-71.

[16] Tatsch v. Hamilton-Erickson Mfg. Co., 76 N.M. 729, 418 P.2d 187 (1966).

[17] 51 Cal. 2d 409, 333 P.2d 757 (1958).

[18] *Id.* at 414, 333 P.2d at 761. Later California decisions, however, seem to consider the question of reasonableness one of fact and generally decide the question on the basis of usage in a particular locality. *See, e.g.*, MacIsaac & Menke Co. v. Freeman, 194 Cal. App. 2d 327, 333, 15 Cal. Rptr. 43, 52 (1961). Judge Traynor did give some consideration to local usage in making his decision, *see* 51 Cal. 2d at 416, 333 P.2d at 761, but he apparently drew inferences from general experience in determining reasonableness.

[19] *See, e.g.*, E.A. Coronis Associates v. M. Gordon Constr. Co., 90 N.J. Super. 69, 216 A.2d 246 (App. Div. 1966).

Co.[20] the general informed the sub that its bid was being used, but the sub discovered a mistake in the bid and refused to sign the subcontract. In reversing a summary judgment for the general, Judge Fahy stated that because of the sparse record, the court lacked the relevant facts for determining whether the general's reliance was justified. The case was remanded for a decision as to whether "by reason of local custom in the trade"[21] the general's reliance was reasonable. Although this approach lacks certainty, it at least ensures a realistic result.

But even when the promissory estoppel doctrine is properly applied, its value and adequacy are limited because it protects only the general contractor.[22] Although the sub is bound once the general uses the bid, the general has the choice of reopening negotiations with other subs. This allows him to use the low bid as a lever to deflate bids from other subs (bid shopping) and encourages other subs to undercut the low bidder after the prime contract has been awarded (bid peddling). The general can thus enforce the bid against the sub or, at his option, give up the bid made firm by promissory estoppel and shop for lower bids. The sub has no equivalent power.

As bid shopping becomes widespread in a given area, subs puff their initial bids to leave room for later negotiations, thus fictionalizing the bidding process.[23] Moreover, when a sub accepts a lower price to avoid losing a contract, he may be tempted to cut corners, producing a less satisfactory job.[24] Additionally, the awarding authority receives no benefit since it has already agreed to pay the general a fixed sum.[25] In short, only the general benefits in this situation.

Although extrajudicial methods have been formulated to meet these evils,[26] the common law has largely ignored them. Ever since *James Baird*

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[20] 319 F.2d 736 (D.C. Cir. 1963). *Compare* Hedden v. Lupinsky, 405 Pa. 609, 612, 176 A.2d 406, 407-08 (1962).

[21] 319 F.2d at 740.

[22] A few courts have recognized the one-sided nature of the protection afforded by the doctrine. Williams v. Favret, 161 F.2d 822 (5th Cir. 1947); Milone & Tucci, Inc. v. Bona Fide Builders, 49 Wash. 2d 363, 301 P.2d 759 (1956).

[23] *See* Ring Constr. Corp., 8 T.C. 1070, 1075 (1947); H.R. Rep. No. 434, 85th Cong., 1st Sess. 5 (1957) (accompanying H.R. 7168). This tendency to inflate bids generates a vicious circle. Inflated bids are one of the reasons advanced by generals for the necessity of post award negotiations with subs. *Hearings on S. 2907 Before a Subcomm. of the Comm. on the Judiciary, Report of the FTC*, 82d Cong., 2d Sess. 173-75 (1952); *Joint Hearings on S. 848 Before the Subcomm. of the Comm. on the Judiciary*, 83d Cong., 1st Sess. 154, 168 (1953).

[24] *See* Ring Constr. Corp., 8 T.C. 1070, 1076 (1947)

[25] *Id.*

[26] For example, some states and the federal government require generals to submit a list of proposed subs; this list can only be altered for good cause. *E.g.*, Cal. Gov't Code § 4104 (West 1966). While this requirement protects the awarding authority

Co. v. Gimbel Brothers[27] the courts have uniformly refused to treat the general's use of the sub's bid as acceptance which would bind the general. Instead, the sub's bid is treated as an offer to form a bilateral contract, and the general is bound only if he accepts by a return promise.[28] For example, in *Milone & Tucci, Inc. v. Bona Fide Builders*[29] the general used the sub's bid in his proposal but later discovered it was not the lowest bid. After being awarded the general contract, the general gave the subcontract to another sub. Although the trial court had found that construction industry usage dictated that an implied contract was created by the general's use of the sub's bid in this situation, and accordingly had decided that the general was bound, the Washington Supreme Court reversed on the ground that there had been no return promise.

By rejecting usage as a valid basis for concluding that the offer had been accepted, the court adhered to common-law dogma.[30] Although a prior course of dealing[31] or custom[32] has sometimes been considered a sufficient

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from substandard work by untrustworthy subs, it has been held to confer no rights on the sub. Klose v. School Dist., 118 Cal. App. 2d 636, 258 P.2d 515 (1953). *See also* Kiely Corp. v. Gibson, 231 Cal. App. 2d 39, 41 Cal. Rptr. 559 (1964); Cal. Gov't Code § 4103 (West 1966). *But see* People v. Inland Bid Depository, 233 Cal. App. 2d 851, 44 Cal. Rptr. 206 (1965).

Subs have formed "bid depositories" as a form of self-regulation, but these depositories arguably violate the antitrust laws. *See* Christiansen v. Mechanical Contractors Bid Depository, 230 F. Supp. 186 (D. Utah 1964); United States v. Arizona Consol. Masonry & Plastering Contractors Ass'n, 5 Trade Reg. Rep. (1962 Trade Cas.) ¶ 45,059 (D. Ariz. 1962); United States v. Bakersfield Associated Plumbing Contractors, Inc., 1958 Trade Cas. ¶ 69,087 (S.D. Cal.), *modified*, 1959 Trade Cases ¶ 69,266 (S.D. Cal. 1958). Furthermore, the depository cannot control nonmembers and has not proven completely satisfactory. *See generally* Schueller, *Bid Depositories*, 58 Mich. L. Rev. 497 (1960).

[27] 64 F.2d 344 (2d Cir. 1933).

[28] The absurdity to which this doctrine can be carried is illustrated in Williams v. Favret, 161 F.2d 822 (5th Cir. 1947). The general's bid was due June 6. Clearly intending to formalize the negotiations before that date, the sub wrote: "'If our estimate used wire us collect prior to June 6 or else same is withdrawn.'" *Id.* at 823 n.1. The general thereafter wired: "'We used your bid . . . .'" *Id.* The court refused to recognize the existence of a contract.

[29] 49 Wash. 2d 363, 301 P.2d 759 (1956).

[30] *See* Albert v. R.P. Farnsworth Co., 176 F.2d 198 (5th Cir. 1949); Robert Gordon, Inc. v. Ingersoll-Rand Co., 117 F.2d 654 (7th Cir. 1941); O.C. Kinney, Inc. v. Paul Hardeman, Inc., 151 Colo. 571, 379 P.2d 628 (1963). This rule has been criticized as "nonsense." Levie, *Trade Usage and Custom Under the Common Law and the Uniform Commercial Code*, 40 N.Y.U.L. Rev. 1101, 1110 n.40 (1965)

[31] Ammons v. Wilson & Co., 176 Miss. 645, 170 So. 227 (1936); Cole-McIntyre-Norfleet Co. v. Holloway, 141 Tenn. 679, 214 S.W. 817 (1919); Hobbs v. Massasoit Whip Co., 158 Mass. 194, 33 N.E. 495 (1893); Corbin § 75; Grismore § 51; Restatement of Contracts § 72(1)(c) (1932); Williston § 649.

[32] T.C. May Co. v. Menzies Shoe Co., 184 N.C. 150, 113 S.E. 593 (1922); Corbin

basis for a court's implying acceptance from an offeree's silence, trade usage has generally been restricted to a constructional function.[33] Thus while usage may be examined to interpret contract terms once the parties are found to be in a contractual relationship,[34] it cannot be used to establish that relationship.[35] The UCC offers a realistic escape from this limitation.

UCC

As a threshold problem, Article 2 of the UCC applies only to "transactions in goods."[36] While some contracts in the construction industry fit this definition, many do not since they involve transactions for "goods and services."[37] Even though not expressly applicable, however, the Code will undoubtedly influence judicial solutions to bidding problems.

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§ 75; WILLISTON § 649; *cf.* GRISMORE § 51; RESTATEMENT OF CONTRACTS § 72(1)(c) (1932). *See generally* Levie, *supra* note 30; Note, *Custom and Trade Usage: Its Application to Commercial Dealings and the Common Law*, 55 COLUM. L. REV. 1192 (1955). Custom has been considered a basis for implying acceptance from the offeree's silence less often than has a prior course of dealing.

[33] CORBIN § 543; GRISMORE §§ 99, 106; WILLISTON §§ 648, 651-54; Levie, *supra* note 30.

The distinction between custom and usage is often hazy at best. Courts frequently categorize a trade usage as a custom in order to enforce an agreement. *E.g.*, T.C. May Co. v. Menzies Shoe Co., 184 N.C. 150, 113 S.E. 593 (1922). Furthermore, evidence of trade usage is usually relevant, and sometimes indispensable, in proving a prior course of dealing. Note, *Custom and Trade Usage: Its Application to Commercial Dealings and the Common Law*, 55 COLUM. L. REV. 1192, 1194 (1955).

[34] Distillers Dist. Corp. v. Sherwood Distilling Co., 180 F.2d 800 (4th Cir. 1950); Frigaliment Importing Co. v. B.N.S. Int'l Sales Corp., 190 F. Supp. 116 (S.D.N.Y. 1960); White v. Barton, 269 S.W.2d 673 (Mo. 1954). See sources cited, *supra* note 33; RESTATEMENT OF CONTRACTS §§ 230, 246 (1932); 9 J. WIGMORE, EVIDENCE § 2462 (3d ed. 1940). Some courts forbid introduction of evidence of usage to vary or add to the terms of a contract which contains no ambiguities on its face. *See* Booher v. Williams, 341 Ill. App. 504, 95 N.E.2d 518 (1950); Highley v. Phillips, 176 Md. 463, 5 A.2d 824 (1939).

[35] National Bank v. Burkhardt, 100 U.S. 686 (1879); Savings Bank v. Ward, 100 U.S. 195 (1879); Tennessee Enamel Mfg. Co. v. Stoves, Inc., 192 F.2d 861 (6th Cir. 1951), *cert. denied*, 342 U.S. 946 (1952); Ghiselin v. John Hancock Mut. Life Ins. Co., 79 Cal. App. 2d 438, 180 P.2d 50 (1947).

[36] UNIFORM COMMERCIAL CODE § 2-102. "'Goods' means all things (including specially manufactured goods) which are *movable at the time of identification* to the contract for sale other than the money in which the price is to be paid, investment securities (Article 8) and things in action." UNIFORM COMMERCIAL CODE § 2-105(1) (emphasis added).

[37] There is a dearth of authority interpreting the term "goods" under the UCC. The official comments point out that "[T]he definition of goods is based on the concept of movability and the term 'chattels personal' is not used." UNIFORM COMMERCIAL CODE § 2-105, comment 1. The Statute of Frauds, The Uniform Sales Act, and sales tax cases may be the frame of reference. Where the service aspect predominates and the exchange of personal property is only incidental, the contract is not a contract for sale. William H. Wise & Co. v. Rand McNally & Co., 195 F. Supp. 621, 625 (S.D.N.Y. 1961) (contract to print and bind books not a contract of sale); York Heating &

The UCC reflects a careful and studied attempt by some of the most competent legal minds to formulate a modern and workable scheme governing commercial transactions. Although the Code was initially limited in scope, the framers intended it ultimately to be assimilated into the general body of law.[38] The Code solutions to recurring problems can be profitably compared with judicial precedents and can be used as a "basis for reasoning" to allow the common law to mature and keep pace with modern commerce.[39] The logic of such an approach can readily be demonstrated. Assume two transactions between a sub and a general, taking place on the same day and concerning the same job; one involves only goods, the other involves goods and services. There seems to be no reason for the legal consequences of the two transactions to differ merely because the Code is directly applicable to one, but not to the other.[40] If the Code presents a better solution, it, like any other precedent, should assist the court in reaching a just result.[41]

Ventilating Co. v. Flannery, 87 Pa. Super. 19 (1926) (contract to install heating system not a contract for sale). Similarly, where goods have been incorporated into a building, rather than sold separately, the courts have held that there is no contract for sale. United States v. San Francisco Elec. Contractors Ass'n, 57 F. Supp. 57 (N.D. Cal. 1944); Crystal Recreation Inc. v. Seattle Ass'n of Credit Men, 34 Wash. 2d 553, 209 P.2d 358 (1949) (contract to construct and install restaurant fixtures not within Uniform Sales Act). In *San Francisco* the court noted that "[y]ou cannot take a composite process of construction and . . . split . . . [it] into . . . component elements . . . ." 57 F. Supp. at 67. But the fact that the transaction between the general and the owner is not a contract for sale does not necessarily mean that there is no contract of sale between general and sub since the concept of movability may be present in the latter case but not in the former. The concept of goods under the UCC has been broadened to cover "specially manufactured goods." UNIFORM COMMERCIAL CODE § 2-105(1).

The lack of "positive guidance" as to the scope of article two is admitted by Professors Bunn, Snead and Speidel, who suggest that the distinction between a contract for goods and a contract for goods and services is less important under the Code than under prior law. C. BUNN, H. SNEAD & R. SPEIDEL, AN INTRODUCTION TO THE UNIFORM COMMERCIAL CODE § 2.5 at 34-35 (1964) [hereinafter cited as BUNN, SNEAD & SPEIDEL].

[38] UNIFORM COMMERCIAL CODE § 1-102, comment 1. Professor Corbin expressed similar hopes. Corbin, *The Uniform Commercial Code—Sales; Should It Be Enacted?*, 59 YALE L.J. 821 (1950).

[39] This philosophy is carefully and fully explored in Note, *The Uniform Commercial Code as a Premise for Judicial Reasoning*, 65 COLUM. L. REV. 880 (1965). For a casenote which urges the application of the Code by analogy, see 78 HARV. L. REV. 895, 898 (1965).

There are limits to this philosophy. Thus the framers recognized that the Code should only be applied by analogy to those situations where the justification for the Code provision would apply to the analogous area. UNIFORM COMMERCIAL CODE § 1-102, comment 1.

[40] One court chose to ignore the Code even though the transaction appeared to be a sale of goods. Tatsch v. Hamilton-Erickson Mfg. Co., 76 N.M. 729, 418 P.2d 187 (1966) (sale of twelve tables with benches).

[41] *See* Schultz at 244 n.22 (discussing the Statute of Frauds):

If the Code is applied to the general-sub relationship, it would appear to be relevant in two ways. First, application of the Code's firm-offer provision could alleviate partially the uncertainty caused by the ability of the sub to withdraw his bid. Second, the Code's liberal approach to contract formation offers a means to restore mutuality to the bidding process.

Firm Offers

Based on what was regarded as an established practice among businessmen to make firm offers,[42] Section 2-205 of the Code provides:

> An offer by a merchant to buy or sell goods in a signed writing which by its terms gives assurance that it will be held open is not revocable, for lack of consideration, during the time stated or if no time is stated for a reasonable time, but in no event may such period of irrevocability exceed three months; but any such term of assurance on a form supplied by the offeree must be separately signed by the offeror.

Like written obligation statutes, this section eliminates any need for the offeror to show reasonable reliance.

Only offers made by merchants come within the terms of this section. A "merchant" is defined as one who "by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction . . . ."[43] To the extent that a merchant has been characterized as a "professional" rather than "casual" buyer or seller,[44] subs should be classified as merchants.

Although section 2-205 provides that a firm offer is not revocable "for lack of consideration," it does not completely preclude the offeror's withdrawal of his offer. If the offeree has not accepted within the stated time or, if no time was stated, within a reasonable time, the offer can be withdrawn. An offer also is revocable if the offeree knows or has reason to know that the offeror has made a mistake,[45] or if the offeree himself has

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> There is some authority for the proposition that a bid for plumbing installation . . . will be said to differ from the ordinary contract of sale and that the Statute will be narrowly construed not to apply, but it is difficult to understand why a sales transaction which is important enough to require a writing should become less important when the sale is coupled with the work of installation.

The results of the writer's questionnaire indicate that contractors generally make no differentiation between the two types of transactions. See text at 1739-40 *infra*.

[42] *See* Corbin, *The Uniform Commercial Code—Sales; Should It Be Enacted?*, 59 Yale L.J. 821, 827 (1950); Schultz at 237 n.3.

[43] Uniform Commercial Code § 2-104(1).

[44] Bunn, Snead & Speidel § 2.6 at 37.

[45] The framers of article 2 state that: "Safeguards are provided to offer relief in the case of material mistake by virtue of the requirement of good faith and the general law of mistake." Uniform Commercial Code § 2-205, comment 5.

induced the mistake.[46] Furthermore, even if a mistake is not large enough to put the offeree on notice, but nevertheless would impose an unfair financial burden on the offeror, revocation should be allowed if the offeree has not proceeded so far in the transaction that he cannot be returned to the status quo.[47]

It has been argued that the Code's firm-offer provision should not be applied lightly to the bidding process since it would only aggravate the sub's already inferior bargaining position.[48] However, this argument focuses on the wrong issue. Rather than remove the general's protection from unscrupulous subs, the object should be to strengthen the sub's protection; no regulation is seldom the answer to incomplete regulation.[49]

Since section 2-205 only applies to written offers, it has limited importance in the bidding process. A written firm offer has been at issue in only one reported case.[50] While Professor Schultz indicated that approximately sixty-six per cent of the bids submitted by subs were "firm bids,"[51] it is not clear how many of these were in writing. In Virginia only 12 of 45 subs and only 7 of 67 generals reported that they gave or received written firm bids.[52] Qualified answers in this latter group indicate that the number of bids which can be classified as firm offers is even lower.[53] Thus the promissory estoppel doctrine will continue to be of major importance in defining the sub's obligations.

Contract Formation Under the UCC

The lack of mutuality which results from binding only the sub would be eliminated if a conditional contract were deemed to exist from the moment a general uses a sub's bid in his own proposal. Suggested by commentators,[54] this novel approach has not yet been adopted by any court.

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[46] *E.g.*, Cemex Constr. Co. v. James, 374 F.2d 921 (8th Cir. 1967).

[47] *See, e.g.*, New Amsterdam Import Co. v. L. & S. Delivery & Transfer Co., 17 Misc. 2d 102, 183 N.Y.S.2d 864 (App. T. 1958); Baltimore v. De Luca-Davis Constr. Co., 210 Md. 518, 124 A.2d 557 (1956).

[48] Note, *The Uniform Commercial Code as a Premise for Judicial Reasoning*, 65 Colum. L. Rev. 880, 889 (1965).

[49] More fundamental objections are raised by the results of the writer's survey. See text at 1733-34, 1740, 1744 *infra*.

[50] James Baird Co. v. Gimbel Bros., 64 F.2d 344 (2d Cir. 1933)

[51] Schultz at 744.

[52] The figures were derived from responses to the writer's questionnaire, which will be discussed *infra*.

[53] Apparently, many contractors assumed that a bid in writing was "firm," even though it did not meet the other requirements of § 2-205. The writer undoubtedly assumed too much legal knowledge on the part of the responding parties when he drafted this question.

[54] *See* Note, *Once Around the Flag Pole: Construction Bidding and Contracts at Formation*, 39 N.Y.U.L. Rev. 816 (1964); 8 B.C. Ind. & Com. L. Rev. 81 (1966).

However, the possibility of finding such a contract would be enhanced if the Code were followed since its provisions on contract formation reflect a broadened conceptual basis favoring a factual approach. Rather than running the risk of frustrating the parties' intent by focusing on whether certain legally operative factors are present to form a contract, the Code gauges legal consequences by looking for an agreement in fact. When such an agreement exists, the Code attempts to give it effect if there "is a reasonably certain basis for giving an appropriate remedy."[55] Hence Section 2-204(1) of the Code provides that "a contract . . . may be made in any manner sufficient to show agreement . . . ."[56] In turn, an "agreement" is defined as "the bargain of the parties *in fact* as found in their language or by implication from other circumstances including course of dealing or *usage of trade* or course of performance . . . ."[57]

An examination of the Code's answer to more specific problems relating to contract formation also reveals its rejection of the formalistic approach of the common law. Thus the Code replaces the common-law rule that a variant acceptance ends the offer with the rule that "[a] definite and seasonable expression of acceptance . . . operates as an acceptance even though it states terms additional to or different from those offered . . . ."[58] Also, technical common-law rules pertaining to mode of acceptance, such as the requirement that telegraphic offers be accepted by telegraph, are eliminated by section 2-206, which states that "an offer to make a contract shall be construed as inviting acceptance in any manner and by any medium reasonable in the circumstances . . . ."[59] Although arguably this section is limited to preventing a variant mode of expression from barring contract formation, it has been suggested that a court should find that a general's use of a sub's bid is an acceptance in a "manner . . . reasonable in the circumstances."[60]

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[55] Uniform Commercial Code § 2-204(3).

[56] Uniform Commercial Code § 2-204.

[57] Uniform Commercial Code § 1-201(3) (emphasis added)

[58] Uniform Commercial Code § 2-207(1).

[59] Uniform Commercial Code § 2-206(1)(a). Section 2-206 uses two words: "manner" and "medium." Yet the official comments seem to equate them:

> Former technical rules as to acceptance, such as requiring that telegraphic offers be accepted by telegraphed acceptance, etc., are rejected and a criterion that the acceptance be "in any manner and by any medium reasonable under the circumstances," is substituted. This section is intended to remain flexible and its applicability to be enlarged as new media of communication develop or as the more time-saving present day media come into general use.

Uniform Commercial Code § 2-206, comment 1.

[60] *See* Note, *Once Around the Flag Pole: Construction Bidding and Contracts at Formation*, 39 N.Y.U.L. Rev. 816, 832-34 (1964); 8 B.C. Ind. & Com. L. Rev. 81 (1966). The author of the N.Y.U. Note contends that § 2-206 merely codifies the common law's "reasonable acceptance" approach, as formulated in the classic case of Adams v. Lindsell, 106 Eng. Rep. 250 (K.B. 1818). The notion that *Adams v. Lindsell* is the key is ques-

Whether in determining the existence of a contract one looks for an "agreement" under section 2-204 or for an acceptance "reasonable in the circumstances" under section 2-206, the approach would seem not unlike that of Judge Fahy in *Litterio*. Under either section resolution of the issue demands a factual investigation, and this investigation, in turn, demands an examination of trade usage.

Trade usage, as employed by the UCC, is a matter of fact and is grounded in the practice of a particular industry, market and locality. It is defined as a practice that has achieved "such regularity of observance in a place, vocation or trade as to justify an expectation that it will be observed with respect to the transaction in question."[61] However, the framers of the Code deliberately omitted use of the word "custom" with all its attendant common-law limitations. Unanimity is not required for a usage to be recognized, and it is sufficient that the usage is reasonable and is observed by the great majority of reputable contractors.[62]

Because the Code gives no more than a general definition of the nature of trade usage, the utility of this concept as a basis for establishing a contractual relationship is problematic. It is left to the courts to decide what degree of industry-wide compliance with a particular practice is necessary before usage will be found to exist. Although section 1-205(2) provides that trade codes may be considered as evidence of usage,[63] these codes are of little assistance in the construction industry, and courts must therefore broaden their inquiry to include proof from other sources. At least one of these sources available to a court is the study carried out by Professor Schultz. Since that study is somewhat dated and limited in geographical scope, however, checking its accuracy by conducting a similar inquiry in a different geographical locale seemed desirable. While the results of the Schultz study and the present study will not be conclusive, they can serve as guides to those who wish to explore usage further.

SURVEY OF VIRGINIA CONTRACTORS

Questionnaires and covering letters explaining their purpose[64] were sent to generals and subs doing business in Virginia. Names of the generals were

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tionable since the holding was designed to protect a willing offeree, whereas, under the circumstances being considered, the general must be considered an unwilling offeree. Also, the court merely decided at what point an acceptance took effect, not whether certain equivocal conduct constituted an acceptance. However, this theory can serve as a useful tranquilizer for jurists who need ancient authority to bolster their opinions.

[61] UNIFORM COMMERCIAL CODE § 1-205(2).

[62] *See* UNIFORM COMMERCIAL CODE § 1-205, comment 5.

[63] UNIFORM COMMERCIAL CODE § 1-205(2).

[64] The letter provided in part:

> All too frequently the law has been out of step with business realities. The

obtained from the membership roster of the Virginia Branch, Associated General Contractors of America, Incorporated. Subs' names were obtained from the 1966 roster of Registered Contractors of the Virginia State Registration Board for Contractors. Many of the questions and the hypothetical situations posed in the questionnaire were similar to those used by Professor Schultz in his earlier survey. However, since his survey was directed primarily to section 2-205, changes were made to broaden the inquiry to include contract formation. Fifty-three of 94 subs and 67 of 100 generals responded to the questionnaires.[63]

Subcontractor Survey

The subcontractor questionnaire included a hypothetical fact situation in which the sub's bid was used by the general in preparation of the general's bid for the prime contract. Although similar to the hypothetical posed by Professor Schultz, this fact situation was augmented by a new twist in that the hypothetical general bid shopped and then awarded the subcontract to another sub.[64] Following this introductory fact situation, twelve questions were asked. Several, though not directly related to the issues of this Note, provide useful background information on bidding and contracting procedures.

(1) *When do you submit your bid to the general?*

The answers given by the subs to this question fall into three groups: twenty-four hours or more before the general makes his bid (4), twelve to twenty-four hours before the general makes his bid (4), one to four hours

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> reason I am writing my article is to try to get the law to reflect what businessmen think it should be on the basis of their business experience and business needs. In order for the law to be in harmony with business practices and customs, it is necessary to determine what these practices and customs are. This is where you can be of great help to me and ultimately to yourself and the other members of your profession.
>
> I have selected your company as one of a hundred in Virginia from which I hope to gain some insight into the facts of the construction industry. The enclosed questionnaire will aid me in drawing some conclusions as to what you think and do.

[63] The higher percentage of responses from generals is most likely due to the fact that their names were taken from a professional organization, interested in matters related to the survey. On the other hand, subs were simply taken from a list of registered contractors.

[64] The hypothetical situation read as follows:

> Please assume that you have been invited by a general contractor to make a bid on a portion of the work on a private construction job for which he is preparing a proposal. Of those subs bidding on that portion of the project your bid is low and the general uses your bid in his own bid. This comes to your attention. Later, however, you find out that the general has awarded the subcontract to another sub at a price slightly lower than your bid price. What would you do?

before the general makes his bid (42). Of those in the last category, 26 stated that they withheld their bids until the last one or two hours.

The reason for this late bidding is to minimize bid shopping by the general. Several subs stated that the time of bid submission varied according to the general with whom they were dealing. Eleven subs indicated that their bids were submitted "immediately prior to the time the general is to bid" or "at the last possible minute so the general will have a minimum amount of time to do his bid shopping." The clear conclusion is that most subs exert time pressure on the general by last-minute bidding.

(2) *Do you usually submit to the general*

[12] a. written bids which state that they will not be withdrawn for a certain time?
[22] b. oral bids which state that they will not be withdrawn for a certain time?
[20] c. bids which say nothing about whether they will remain open?

Of the 54 answers (several subs gave more than one answer to this question), only 12 indicated that the sub bid in such a way that section 2-205 might cause his bid to be firm. However, 2 other subs indicated that oral bids submitted immediately prior to bid opening were later confirmed by letter. Apparently specifications often mention the period of time bids are to remain open since 2 subs stated that they bid according to specifications, and 1 stated that "specifications . . . are part of the bid." Although over 50 per cent make firm bids, less than 25 per cent make bids that qualify under section 2-205.

(3) *When a general decides to use your bid in his own bid to the awarding authority, does he*

[2] a. notify you before using it in his own bid?
[7] b. notify you immediately after using it in his own bid?
[19] c. notify you as soon as he has been awarded the prime contract?
[27] d. notify you at some later time?

Few comments were volunteered on this question. One sub stated that "the better generals notify subs as soon as possible." The great majority, however, hears nothing until the general has been awarded the prime contract.[87]

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[87] *Compare* Schultz at 265-66, where one-fifth of the subs said they were notified when the general used their bid in his proposal. Only 17 reported that the general notified them immediately after the prime contract was awarded.

(4) *If you learn that the general has used your bid in his own bid but you also discover that you made a mistake in your bid, do you feel*

[53] a. bound to go ahead and perform the work at your original bid price?
[0] b. free to withdraw?

The response to this question was only surprising for the unanimity expressed.[68] Of course, it is easy to be magnanimous when answering a questionnaire. Since several generals reported being faced with a situation such as this, we must assume that the subs' responses are not completely representative. Nevertheless, considering the sub bound at this point would seem to be commercially reasonable.

(5) *Would your answer to the question above depend on whether the bid you submitted was a bid that stated it would not be withdrawn?*

Yes: [7] No: [44].

Instead of feeling bound to the general because they said in writing they would be, the decided majority (85 per cent) believe they are obligated notwithstanding their silence as to whether the bid would remain open.[69] One sub stated that whether or not a bid is "firm" is irrelevant. "Our word is our bond and our reputation paramount." The response to the next question, number six, suggests it is the relative position of the parties rather than the presence of a firm bid which causes subs to feel that they must stick to their bids as originally submitted. Curiously, however, 7 indicated that their answers to the instant question, number five, would be different depending on whether their bid to the general was "firm," although 100 per cent had answered in response to question four that they would consider themselves bound if the general relied on their bid. This again indicates that some subs may not have been completely frank when they answered question four.

(6) *Would you feel compelled to do the job if*

a. you knew the general relied on your bid and you felt morally or legally bound to him?
Yes: [51] No: [0] Sometimes: [1].

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[68] *Compare* Schultz at 267, where 75 subs felt bound while 13 felt free to withdraw. Schultz's questionnaire posed a rise in prices rather than a discovered mistake as the reason for the sub's withdrawal. This may account for the variant response.

[69] *Compare* Schultz at 269.

b. you feared loss of business reputation that would endanger future business?
Yes: [17] No: [7] Sometimes: [4].

c. Some other reason (please comment): [3].

These answers indicate that it is the precarious position of the general after he has submitted his own bid which accounts for the sub's feeling he is bound to his bid. This is bolstered by the response to part b of the question—only 17 out of 51 indicated fear of losing business reputation as a reason.[70] Again, it must be remembered that it is easy to be charitable in a simulated situation. As to part c of the question, 2 subs indicated that "past experience with this particular general would be important," and 1 maintained that professional "responsibility" was the prime factor.

(7) *Do you usually find that additional negotiations between you and the general are necessary before a satisfactory working agreement is reached?*

Yes: [25] No: [28].

If your answer is "No," please explain the circumstances.

(8) *If you and the general bargain further after you have submitted your bid for the subcontract work, are these negotiations conducted*

[12] a. before the general submits his bid to the awarding authority?
[5] b. after the general submits his bid to the awarding authority but before the prime contract has been awarded?
[22] c. after the award of the prime contract?

These questions suffered from a lack of clarity. It became increasingly clear that in answering, the subs did not distinguish between negotiations about price and negotiations about other terms. Thus a typical "No" answer included the comment: "Bid proposals are usually given per plans and specifications. Why should negotiations be necessary?" Several mentioned that the only time they negotiated price was either when the lowest general exceeded the amount allotted for the job or when specifications were changed. Ten subs emphasized that they did not tolerate price shopping. One stated, "No bargaining and no price cutting before or after bid time." Another said, "We give only one price and do not negotiate." A third said simply that "if he [the general] uses our price, we do the job at that price or not at all." Yet nearly one-half the subs admitted they conducted further negotiations. And many of these probably would agree with the sub who, somewhat resigned to price shopping, pointed out that "generals always try to beat the bid down."

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[70] *Compare* Schultz at 268, where 70 subs felt bound to perform at the bidded price because they knew "The general relied on your bid and you feel morally or ethically bound to him." Only 4 indicated they would perform because they felt legally bound.

(9) *Do you ever have any difficulty with a general who bid shops (in other words, uses the low bid he has received to bargain with other subs to get them to lower their own bids) before awarding the subcontract?*

Yes: [44] No: [8].

(10) *In your opinion is it unethical for the general contractor to bid shop before the award of the prime contract?*

Yes: [47] No: [6];

after the award of the prime contract?

Yes: [47] No: [3].

The answers to these questions were not surprising. A clear majority of subs has experienced trouble with bid shopping and believes it to be unethical. However, analysis of the answers yields additional information. For example, the 8 subs who indicated they had never experienced trouble with bid shopping answered "Yes" on both parts of question ten. On the other hand, all 6 subs who believed that bid shopping before the award of the prime contract was not unethical had experienced trouble with bid-shopping generals. However, 2 of these believed it would be unethical to shop after the award of the prime contract. Lastly, 1 sub who had experienced difficulty with bid shopping believed it was unethical to shop before, but not after, the award of the prime contract.

More significantly, 36 of the subs who had had difficulty with bid shopping believed that it was unethical for generals to engage in either preaward or postaward bid shopping, while 4 indicated that only postaward bid shopping was unethical. This indicates that subs are not only concerned with the general's superior bargaining power after he has been awarded the prime contract, but also with disclosure of their bids to competitors at any time.

(11) *Have you ever felt compelled to take any measures to counteract bid shopping?*

Yes: [45] No: [5].

If so, please describe.

Since this question overlapped the hypothetical, the responses to both were combined. By far the largest number (31) indicated they would stop submitting bids to a bid-shopping general. Seven reported they had tried a bid depository, and 6 indicated they would "puff" their bids to that general. Four subs said they would publicize the general's actions to other subs. Strangely, only 3 listed late bidding as a weapon, although the vast majority in fact follow this procedure, as is indicated by the response to question one. Other methods to counteract bid shopping included "trapping" the general by first quoting a low price and then withdrawing. One sub said only that he would "get griped"; another said he would "do nothing." At the other extreme, one sub listed an arsenal of weapons he employed: "Refuse to bid, quote higher price, quote late, quote only with commitment at time of quoting." Another reported that the best method to counteract bid shopping was to submit bids only to honest and competent generals since "bid shoppers are most always the poorest contractors and credit risks." One harried sub said, "Sorry, don't have time to write a book on this subject. Believe me, I could do just that." Significantly, no sub mentioned the possibility of taking the general to court.

(12) *What objections, if any, would you have if a law court found that a contract was formed so that both you and the contractor were bound to perform as of the time your bid was used by the general in his own bid? This contract would only take effect if the general received the prime contract.*

This is the most important question, and the response was predictable. The only surprise was that complete unanimity was not achieved. Five subs registered some disenchantment with such a result while 48 expressed their approval. Many added comments, such as "Wonderful!" or "I think this is the way it should be." Of the 5 subs who expressed reservations about finding a contract at this point, none was strongly opposed. Two felt that a general should not be forced to deal with a sub he discovers to be unsatisfactory after bid opening. Another stated that escalator clauses would have to be taken into account. The 2 remaining were not satisfied that such a finding alone would stop bid shopping.

General Contractor Survey

As a rule, the generals volunteered more information than the subs, and a wealth of information was gathered. After giving the same instructions to the generals as were given the subs, the following hypothetical situation was posed:

> Please assume that you are preparing to bid as a general contractor on a private construction job in the neighborhood of $300,000. In the process of preparing your bid you solicit bids from subcontractors on a portion of the work (for example, the electrical work). You select the low bid from among those submitted by the subs and use it as a basis for computing the price of your own bid. The low bidding sub knows that you used his bid. Shortly thereafter you are awarded the prime contract, and on the same day the low bidding sub tells you that he made a mistake in his bid and will have to withdraw his bid. If you are unable to find another sub at approximately the same price, what do you do?

A variety of answers was given to the hypothetical problem. The largest number (8) stated that they would consider legal action. Another group (6) said they would absorb the loss and award the contract to another sub. Three of these stated that they had actually experienced such a situation, thus lending a special credence to their answer. Other answers ranged from ending business relations or exerting other extralegal pressure to having the "ulcer bottle refilled." However, a majority of those responding did not answer this question, and therefore no fully representative conclusions can be drawn.[11]

(1) *When do you normally receive bids from the subcontractor in preparing your own bids?*

As with the subs, answers to this question fell into three categories. For 62 responses, the breakdown was as follows:

[41] One to two hours before the general must submit his bid.
[14] Within twelve hours before the general must submit his bid.
[7] Twenty-four hours or more.

The response to this question coincides with the answers given by the subs and dramatizes the pressure under which generals operate. As one general observed, there is "insufficient time to enter sub price and submit bids. Subs generally hold out until the last minute to minimize bid shopping." Another noted: "The whole chain of supply is suspicious of someone 'leaking' bid information to his competitors." This same general described preparation of bids in the following terms:

> Preparation of bids is a *thoroughly hectic affair* when it comes to re-

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[11] *Compare* Schultz at 261, where 48 generals indicated they would "forget it" if the sub withdrew, 13 said they would "threaten him with everything short of a law suit," and 2 said they would "threaten him with suit."

ceipt of subbids. In our office three in-coming telephones are in continuous use for two or three hours before the bids are due with three people answering and scribbling down abbreviated notes representing subbids as fast as they can. It is *remarkable* that errors and misunderstandings are rare.

(2) *Do subs usually submit*

[7] a. written bids which state that they will not be withdrawn for a certain period of time?

[14] b. oral bids which state that they will not be withdrawn for a certain period of time?

[46] c. bids which say nothing about remaining open?

The similarity between the responses of the generals and subs to this question indicates that Section 2-205 of the Code does not cover the large majority of subs' bids.

(3) *Do you always use the low bid from among those submitted by the subs?*

Yes: [31] No: [35].

If not, please comment.

The Yes-No tabulation has little significance by itself. The question calls for an absolute answer, and the responses fortunately tempered the question with business-world qualifications. Twenty of the 31 answering "Yes" volunteered that they used the low bid unless the low bidder had a poor reputation or had performed unsatisfactorily on previous jobs. Three others qualified a "Yes" answer by stating that they used the lowest solicited bid. Since bids are only solicited from trustworthy subs, these three answers can also be placed in the last category. Twenty-six of the 35 answering "No" qualified their answers by volunteering that they would not use a low bid from a sub with a poor reputation or from one who was in financial trouble. Thus 49 of 66 responding generals volunteered that they would use the lowest bid unless the sub was considered untrustworthy.

The answers to this question yielded an unexpected premium. The number of unsolicited responses indicating a serious concern with untrustworthy subs gives added credence to the responses to the key question, number twelve, which will be discussed at a later point.

(4) *Do your methods of selecting a materialman differ in any way from your methods of choosing a subcontractor?*

Yes: [16] No: [44].

If so, please comment.

The response to this question further illustrates the desirability of applying the UCC by analogy to situations not expressly covered. Even those who answered "Yes" listed only minor deviations from their normal procedures, such as the time at which bids are received. There seems to be no significant difference between the formation of contracts for goods and contracts for goods and services in the construction industry.

(5) *After using a sub's bid in computing the amount of your own bid price, do you consider that*

[15] a. he is committed to performing the work at the bidded price?
[46] b. that both of you are bound to each other as of the time you used his bid?
[5] c. that neither of you is bound until there are further negotiations or a formal contract is completed?

The answers to this question substantiate the findings of Professor Schultz.[72] Of 66 generals who answered, 46 (70 per cent) felt they were bound in some way after using the sub's bid. This strengthens the argument that a contract should be deemed to exist at this point.

(6) *Would your answer to the question above be different if the bid was a firm bid (one which states that it will not be withdrawn)?*

Yes: [9] No: [51].

Do your procedures in dealing with firm bids differ in any way from the methods of dealing with a bid which is silent as to whether it will remain open?

Yes: [8] No: [52].

The responses to this question demonstrate the discrepancy between section 2-205 and reality in the construction industry. Neither subs nor generals attribute much significance to whether or not the bid is "firm." The important factor in either case is the general's exposed position during the postbid, preaward stage.

(7) *If the sub withdraws his bid after you have been awarded the prime contract, would you feel that he has been unjust?*

Yes: [65] No: [2].

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[72] *Compare* Schultz at 260, where 65 generals felt bound to award the job to the sub whose bid was used, while only 13 felt free to pick another sub.

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Here, again, the general's exposed position is predictably illustrated.

> (8) *Is it ever your practice to use a sub's bid as an estimate of what that portion of the job should cost with an eye perhaps to doing that part of the work yourself, finding a better price or accepting a lower bid from another sub?*
>
> Yes: [11] No: [54].
>
> ***Please comment.***

The wording of this question may have been unfortunate since a "Yes" answer without qualification would have included two distinct practices —using bids as estimates and shopping for bids. The "Yes" answers all included comments, and none reveals a general who admitted bid shopping. Several generals answering "Yes" agreed with the following comment:

> Only in the case where one sub-bid is received on a particular portion of the work and the bid when compared with our estimate seems to be completely out of reason do we feel justified in soliciting additional bids after the contract award. In this case we would use our estimated price in preparing the bid.

As one general, agreeing with the above, stated:

> By doing so, we commit ourselves to the responsibility for getting this work done for the price we used. It is normally our custom to then attempt to negotiate a contract with the subcontractor by pointing out the reasons why we feel the work should only cost so much. If we are unable to negotiate a contract with this man, we then proceed to negotiate with another subcontractor.

Several answering "No" stated that it would be unfair to request a sub to expend the time and money to compute a bid, only to have the general do the work himself. Many reminded the writer that such practices were unethical under the AGC Code of Ethics.

> (9) *When you determine that a particular sub is low bidder and that you will use his bid in computing your own bid price, do you notify him*
>
> [0] a. before you use it in your own bid?
> [14] b. immediately after you have used it?
> [40] c. as soon as you have been awarded the prime contract?
> [11] d. at some later time?

Despite the moral obligations which may attach upon use of the sub's

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bid, most generals do not notify the subs until they learn they have been awarded the prime contract.[13] However, the reasons given for this delay are significant for their lack of uniformity. Four generals stated that the delay gave them time to evaluate the sub. Three stated that this was "accepted ethical practice." Three others stated that it would "serve no purpose" to notify the sub earlier, while 2 attributed the delay to the "rush" of bidding. Two generals believed prompt notification to be unnecessary since, as one put it, "subs have a way of finding out how they stand." One general said the delay allowed him "to 'pin' down paper work," while another stated that earlier notification was "impractical from the mechanics of contacting them." One general cited the "degree of need to place orders for key or critical materials or scheduling his place in the order of construction." Two said that late notification helped prevent "mistakes," another said it kept "the subs from worrying us," and still another said that earlier notice was "premature." Yet 12 said they would tell the sub if he called "anytime after bid opening."

On the other hand, 7 generals who notify the sub immediately after using his bid volunteered that they believe the sub is "entitled" to know; as one general put it, "the sub is just as interested in knowing where he stands as we are in knowing where we stand as prime bidder." Similarly, 3 others said that notification at this time "establishes better relations with the sub."

Delay in notification can lead to serious enforcement problems if a contract is deemed to exist as of the time the general uses the sub's bid. The effect of a delay will be discussed at a later point.

(10) *Do the subs' bids submitted to you contain enough specificity or do you customarily conduct further negotiations before concluding a satisfactory working agreement?*

This question caused confusion as to whether "negotiations" referred to price or other terms. Of those responding, 25 reported that they usually conduct further negotiations while 28 reported they do not. Of those who do conduct further negotiations, 20 indicated that the negotiations are undertaken only to clarify terms other than price. For example, one general said, "At least half the time there must be negotiations to clear up possible misunderstandings." Another stated, "We must explore the subcontractor's concept of his scope, in terms of our overall prime contract. Very seldom do subcontractors read the special or general conditions which are binding on the prime contractor as well as the subcontractor." Another observed that "negotiations are for interpretation rather than price change."

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[13] *Compare* Schultz at 239, where approximately two-thirds indicated that they did not notify the sub until sometime after bid use.

One general said, "Quite frequently we must clarify bids." Another indicated that sales tax inclusion and time of delivery frequently had to be discussed.

Only 2 indicated that they bargained about price. One flatly declared, "We negotiate with the subcontractor after we have been awarded a prime contract. Any negotiations prior to this time are not conclusive."

Although some generals may have been less than candid in their responses, it seems probable that the great majority does not bid shop. This coincides with the conclusion of most subs that bid shopping it not a common practice among "reputable" generals.

(11) *If you negotiate with the sub after he has submitted his bid, do you do so*

[19] a. before you submit your bid?
[8] b. after you submit your bid but before the award of the prime contract?
[29] c. after the prime contract has been awarded?

The largest group indicated they negotiate after they have secured the prime contract. Since generals are under severe time pressure before bid opening, this is probably the only time such clarifications can be made.

(12) *What objections, if any, would you have if a law court found that a contract was formed as of the time you used the sub's bid in your bid? This contract would only take effect on the condition that you receive the prime contract.*

Objections: [28] No objection: [35].

This was the key question submitted to the general contractors. That a majority of the generals did not object seems remarkable in view of the fact that the change in the law posited by the question would bind the general at an earlier time than is the case under present law. Unreserved acceptance of the proposal was voiced by 21 generals. Comments ranged from "All for it," "Excellent law" and "No objections whatever" to the following statement by one general: "None. We consider we have a contract under those conditions. If such a law were in effect it might serve to eliminate bid shopping." However, it must be noted that 1 nonobjector added that half his work was performed as a sub.

As in question number three, many generals, both objecting and nonobjecting, commented that the reliability of the sub was all important. Thus one objector stated that "a sub's ability to perform is a big cost factor to the general contractor." Likewise, a nonobjector said that he had no objection "so long as we have the right to use the second low bid if for some reason we do not wish to work with the low bidder." Fourteen nonobjectors qualified their answers along these same lines. Fifteen objectors listed this as their primary reason. Thus if this single objection can be satisfied, and if the votes are realigned accordingly, the result would be 13 objecting and 50 not objecting—certainly an overwhelming response.

Lastly, 9 objected because they did not have time to check the items included in the sub's bid during the hectic bid-opening period and did not want to be bound until after they had had the opportunity to make such a check. Three nonobjectors similarly qualified their answers.

CONCLUSIONS

On the basis of the information obtained from the questionnaire, several conclusions can be drawn.

First, section 2-205 has little relevance to the bidding process. Few bids fit the requirements of that section since usually a sub's bid either is oral or says nothing about being firm. Moreover, neither generals nor subs treat written firm bids differently from other bids. Thus the premise underlying section 2-205—namely, that businessmen distinguish written firm offers from other offers—is largely inapplicable in the construction industry.

Nevertheless, promissory estoppel should be used to bind the sub. The vast majority of both subs and generals agreed that the sub should be bound as of the time the general uses his bid. This overwhelming concurrence should preclude a sub's withdrawal of his bid once the general has used it in computing his own bid for the prime contract. Moreover, several subs and many generals treated the sub's bid as firm for the period of time stated in the specifications. While this does not automatically make the offer irrevocable under section 2-205, it does supply a basis for binding the sub under the promissory estoppel doctrine.

The critical question—whether a contract should be found as of the time the general incorporates the sub's bid into his own proposal—cannot be given a simple, categorical answer. The complexities of the bidding process render overly simplistic the "solutions" of earlier commentators.[74] Under certain circumstances a contract could reasonably be found to arise as of the time the general uses the bid. Under other circumstances, it would be unjust to bind a general simply because he uses a sub's bid.

Although seventy-five per cent of the generals believed that both parties were obligated to each other as soon as the general used the sub's bid, many of these objected to being bound automatically at this point. Some of their objections can be dismissed summarily. Several generals agreed substantially with the following:

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[74] *See* Note, *Once Around the Flag Pole: Construction Bidding and Contracts at Formation*, 39 N.Y.U.L. Rev. 816 (1964); 8 B.C. Ind. & Com. L. Rev. 81 (1966).

> Many times the general has to use his best judgment to fill in the gaps between the price quoted by the sub or suppliers and the contract requirements and then if successful negotiate with the low sub to have a complete bid.

In such a situation there can be no contract since no sub's bid has been used.

Another objection raised by both generals and subs concerns the difficulty of proving whose bid was used. This practicality argument does not address itself to the wisdom of finding a contract. It merely adds an administrative difficulty and should not be allowed to shield unethical generals. Moreover, solutions are available. As in certain public contract bidding, the general could protect himself by posting the names of his subs with his own bid. This procedure has been recommended by at least one trade association.[75]

A more substantial objection raised concerns the vagueness of some bids, undoubtedly caused by time pressures. As one general stated:

> None of them get their final bids to us until shortly before bid time—when the estimators must, within about three hours, take (over the phone) the sub's bid, get from him what he has covered—and evaluate all subbids—which entails adding to or deducting from a subbid, whatever he can find is the right price, for the work not included in some, and the extra work included by others. In a job in which there may be 35 subbid items the estimators may have 150 to 200 subbids to evaluate, choose one in each category, transfer the unit prices (which are part of so many bids) onto our sheets, then if there are alternates, again evaluate the bids to see which one is low on each of the alternates, add those bids up, add the alternates up, put them in our bid, say a prayer, and submit our bid.

This same general provided a possible solution:

> If all of the sub bidders send us preliminary letters, outlining the basis of their bids, this last minute rush is slightly easier, but most of them don't.[76]

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[75] NATIONAL JOINT COOPERATIVE COMMITTEE OF THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INCORPORATED—COUNCIL OF MECHANICAL SPECIALTY CONTRACTING INDUSTRY INCORPORATED, RECOMMENDED PROCEDURE FOR RECEIVING AND HANDLING SUB-BIDS FOR THE BUILDING CONSTRUCTION INDUSTRY (1960).

[76] As part of a plan devised to stop bid shopping and yet allow generals sufficient time to evaluate bids adequately, a cooperative committee of generals and subs has stipulated that mechanical specialty contractors (*e.g.*, electrical subcontractors):

> will submit to prime contractors written proposals of intent to bid, describing the precise scope of work being bid, *not less than 24 hours prior to the time established for submission of the prime bid*, verifying the understanding of the

The extent of this problem is uncertain. If plans and specifications are used, the sub's bid must comply with them. The uncertainties in the sub's bid may be of several different kinds. The sub simply may have failed to specify all the details, such as delivery and payment terms, which would be expected to be included in a final agreement. The responses indicated that this was generally the case. Section 2-204(3) of the Code provides for this contingency, and there should be no objection to binding the parties contractually. On the other hand, the sub's bid may be unresponsive to the general's request. In the hectic period prior to the submission of the general's bid, it is understandable that the general might inadvertently use such a bid, only to discover his error at some later time. Since the sub has failed to comply with the general's plans and specifications, he should not be allowed to reap the benefit of the general's error.

The principal concern of most objecting generals is the spectre of being forced to deal with the "unknown" bidder. One general described his objections to the bid-use proposal as follows:

> In a few cases I do not think this would be satisfactory because we have had certain subcontractors bid on work who were not registered and could not qualify to do the work. Also, we have had subcontractors bid on work who do not have a sufficient labor force nor sufficient office personnel to handle a job of this size, and in some cases where there is only a couple hundred dollars difference between the two bids, we will then select the one who is the most capable and who will do the best job. In bidding jobs over the State there are many times when we receive bids from people we do not know or have never heard of before, and we feel like they should be investigated before awarding them the work. So generally, we would object to this procedure.

This problem is dramatically illustrated by the comments of a general who reported receiving a bid ten minutes before his own bid was due which was 85,000 dollars lower than the next lowest bid. There simply was not sufficient time to investigate the bid or the bidder, yet since his competitors most likely had received the same bid, he was torn between using it or discarding it.

Because of competitive pressures, a general cannot be criticized for using a low bid from an unknown sub. Yet it would not be sound to force him to deal with the sub if he is later found to be unreliable. This so troubled one general that he drafted a model provision which provided that a

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work and materials and services to be supplied and performed by the specialty contractor. The price for the work may be included . . . or it may be telephoned or telegraphed in and in any event it must be given [*sic*] the prime contractor *not later then four hours* prior to the submission of the prime bid.

Id. (emphasis added).

contract should be found "unless later investigation revealed financial or technical incompetence on the part of the subcontractor, said opinion registered by an impartial panel of five or more persons qualified to make the decision."

A possible solution was suggested by the generals themselves. Although no question dealt with this possibility, 12 generals volunteered that they treated solicted bids differently than unsolicited bids. If a general solicits bids, he should know in advance the financial position and reliability of the sub. Thus if a sub's bid is solicited and is responsive to the specifications, it is likely a trade usage exists that at the time a bid is used, a contract is formed. It is also likely that this usage exists if the general knows the sub's qualifications in advance. This necessarily introduces the problem of proving the general's prior knowledge, a task which would not seem overly burdensome.

In conclusion the results of the questionnaire demonstrate that a contract should be deemed to exist as of the time of bid use, subject to the following conditions:

1) The sub-bid should be responsive to the plans and specifications; and

2) The sub should be reliable and capable of performing his side of the bargain without unreasonably complicating the general's position.

It is not important whether this result is reached by labeling it a "trade usage," an acceptance in a "manner . . . reasonable in the circumstances" or an updating of the common law. What is important is to give legal effect to the factual realities of the bidding process in the construction industry, thereby eliminating the evils of bid shopping without unnecessarily restricting the general's freedom.

J. C. C., Jr.

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January 31, 1978

Mr. Douglas M. Costle
Administrator
U.S. Environmental Protection Agency
Washington, D. C. 20460

Dear Mr. Costle:

The Congress, in enacting the Clean Water Act of 1977, directed that EPA make a study of bid shopping practices in connection with the procurement of equipment for EPA funded waste treatment projects. EPA was further directed to make recommendations regarding the need, if any, for corrective legislation.

Our letter of October 6, 1977 to you, in brief, expressed our firm opposition to the listing of suppliers as a proposed solution to the problem of bid shopping. We have further reviewed this subject in great depth with our members. Their views are contained in the enclosed statement, reaffirming our opposition to any legislative requirement for listing.

We appreciate your interest in this matter and we look forward to the continuation of our efforts to assist in the efficient implementation of the Construction Grants Program.

Sincerely,

J M Sprouse

J. M. SPROUSE
Executive Vice President

Enclosure

THE FULL SERVICE CONSTRUCTION ASSOCIATION FOR FULL SERVICE MEMBERS

SUMMARY OF AGC ARGUMENTS
IN OPPOSITION TO LISTING OF SUPPLIERS

Introduction

Listing of suppliers serves no useful purpose. Bid shopping is not a problem in the procurement of equipment. The major problem in this field is the failure of equipment manufacturers to meet their responsibilities in the market place.

Bidding Procedures

The methods used by equipment suppliers in furnishing quotations to bidders is chaotic and necessitates negotiations after bid opening.

Compliance with the owner's plans and specifications is not assured in initial proposals by suppliers. Prices are provided so close to bid time that no proper evaluation can be made; even these prices are not firm. The contractor has to negotiate terms after bid opening. If not successful with these negotiations, the contractor then must go to another manufacturer.

Numerous examples of supplier proposals demonstrate problems created by the lack of specificity in their proposals: - failure to meet all specifications; no price quotations, until just prior to bid opening; no firm commitment regarding availability; warranties not consistent with contract terms imposed on the contractor; proposals made by the supplier to the contractor were still subject to approval by the manufacturers; and requirements that contractor pay for equipment when shipped, regardless of the payment terms in the prime contract.

These examples demonstrate that negotiations are required after bid opening to effectively evaluate a supplier's proposal.

Given the present pattern of marketing waste water equipment, the only result of requiring general contractors to list equipment suppliers in their bids to EPA grantees would be to "lock-in" the general contractor to a single supplier, who could, after bid opening, demand whatever price it desired to bring its non-conforming proposal into compliance with the owner's specifications.

Administration of Anti-Bid Shopping and Bid Peddling Would Be Most Difficult

Grantees are already overburdened by administration of existing EPA regulations.

A requirement for listing of suppliers would lead to a rise in bid protests.

Failure to comply with the letter of the listing requirement would cause rejection of bids. Expensive delays in making contract award will follow. This has happened in many cases where listing has been required.

Additional regulations will be required to permit substitutions, with more of the same problems listed above.

A listing requirement puts EPA and the grantee in the center of the contractor-subcontractor-supplier relationship.

Summary

WWEMA's brief provides no justification for supplier listing regulations, using only the age-old arguments against bid shopping and bid peddling. The brief ignores the real problem, - refusal of suppliers to offer strict compliance of their products with the owner's specifications, including all terms and conditions as well as technical specifications, and refusal to provide prices and scope of work with their initial proposals.

AGC recommends requiring suppliers to offer products in strict compliance with the owner's specifications. Suppliers should provide sufficient information to enable the bidder to evaluate a proposal.

AGC is adamantly opposed to a listing requirement. The problems that exist are caused by the failure of suppliers to meet their responsibilities in the free enterprise market place. Listing would not solve the problem but would only impose greater regulatory burdens on EPA and its grantees.

COMMENTS OF THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA TO THE ENVIRONMENTAL PROTECTION AGENCY REGARDING THE PROPOSED LISTING OF PRINCIPAL SUBCONTRACTORS AND EQUIPMENT SUPPLIERS IN CONTRACTOR BIDS UNDER THE EPA CONSTRUCTION GRANTS PROGRAM

The Congressional Conference Committee, in its report on the Federal Water Pollution Control Act Amendments of 1977, requested the Administrator of the Environmental Protection Agency to study and report to Congress on whether or not contractors, under the construction grants program, should be required to list in their bids their intended principal subcontractors and equipment suppliers. As stated in the Committee report, the impetus for this inquiry was provided by concerned equipment suppliers.

It is the view of the Associated General Contractors of America (hereafter AGC) that the listing of principal subcontrators and equipment suppliers by bidders for EPA grantee construction contracts will not serve a useful purpose, but would only serve the economic self-interest of suppliers in the negotiation of purchase orders. AGC submits that a bid shopping problem does not exist in the market for manufactured water treatment equipment. To the contrary, the major problems present in this field today result from the failures of the equipment manufactures to substantially meet their responsibilities in the market-place.

The Methodology Utilized by Equipment Suppliers in Furnishing Quotations to Prospective Bidders is Chaotic and Necessitates Negotiations After Bid Opening

The methods used by equipment suppliers in submitting quotations to prospective prime contractors under the EPA construction grants program is chaotic. It is a normal pattern of conduct for the manufacturer to offer a product that it will not assure is in compliance with the owner's plans and specifications. Moreover, the manufacturer will not identify, with specificity, the aspects of the equipment that do not meet the owner's requirements. It is then left to the general contractor to make these determinations. Magnifying the burden imposed on the general contractor, the equipment manufacturers normally do not provide prices covering their proposals until short hours before the bid opening. Even when prices are furnished, usually 10 to 12 hours before bid opening, they are not firm and salesmen for the suppliers continue to telephone price reductions, frequently reaching 40 to 60 percent of the original price quotation, immediately prior to bid opening. By that time, it is impossible for the general contractor-bidder or his subcontractors to meaningfully evaluate quotations for the equipment. Instead, the general contractor must gamble with the equipment prices to be included in its bid. The more experienced general contractors compute a price of their own for the equipment involved, generally based on a unit price per pound of steel required for the equipment. They have found such a method of pricing to be feasible in the absence of reliable price quotations from suppliers because the equipment involved normally is not esoteric, consisting essentially of a steel framework into which various items of prefabricated equipment such as pumps are incorporated. Because of this system, the successful general contractor-bidder can only negotiate a purchase order for the equipment after bid opening. The manufacturers leave no other opportunity to finalize a prospective purchase order.

To demonstrate the working of the present system, a review of typical proposals to furnish equipment for a treatment facility is illuminating. The following proposals for various items of equipment were tendered by equipment manufacturers to prospective bidders for the treatment facilities for the Southstown Sewage Treatment Agency:

> Proposal A -- The supplier offered to furnish four different items required under the contract, including sewage bar screens, screw pumps, sludge pumps and scum pumps. For three of the four items of equipment, X's proposal provided that the offered equipment would conform to the mechanical specifications of the owner's engineer. The fourth item, the

screw pumps, were offered as an alternate to the specification requirements, and the offered equipment was clearly not in compliance, in some unidentified aspects, with the owner's requirements. It was therefore necessary for the prospective bidders to either ignore the proposal for that fourth item or to attempt to ascertain those areas in which the offered equipment was in compliance with the owner's requirements.

The proposal, like every other proposal described herein, was received without prices with the understanding that prices would be furnished at a later time, before bid opening. As a result, there was no way of knowing whether the offered items were within the competitive range.

The proposal was by its terms valid for a period of 30 days, even though the invitation for bids provided the owner with more than 30 days to evaluate bids and award the contract. As a result, prospective bidders had no way of knowing whether the proposed equipment would be available at a time an order would have to be placed.

Aside from the fact that the proposal did not include prices, it also provided that the prices that were later to be offered would be subject to escalation measured by changes in the Metals and Metal Product Index. Prospective bidders therefore had to consider the risks of price escalation even though the prime contract would not provide for the recovery of escalation costs.

The fine print of the terms and conditions portion of the proposal provided for a one year materials and workmanship warranty measured from the date of shipment, while the general contract provisions required the contractor to warrant the work for a one year period measured from the date of substantial completion of the entire contract work.

Proposal B -- The manufacturer offered to provide screw pumps meeting "the functional requirements of the engineer's plans and specifications" despite the fact that the general contractor would have to furnish equipment meeting the strict requirements of the owner's plans and specifications. Again, prospective bidders were placed in the position of having to ascertain those requirements that the proposed equipment could not meet.

With regard to the price aspect of the proposal, the proposal provided that the company's sales representative would contact prospective general contractors "with full price information before the opening . . ."

The warranty under this quotation was also limited to one year from the date of shipment from the manufacturer.

Proposal C -- This proposal offered to furnish bio-clarifier mechanisms, sludge thickeners and sludge holding tanks "[i]n accordance with [the manufacturer's] understanding of the owner's specification requirements.." Again, it was necessary for prospective contractors to evaluate the offered equipment to attempt to determine whether the equipment would meet the owner's requirements.

This proposal too was limited by its terms to 30 days even though it was a practical impossibility for an order to be placed in that short period of time.

As with the other proposals, the equipment was warranted for one year from the date of shipment.

Proposal D -- The prospective supplier offered to furnish bio-clarifier mechanisms and air lift pumps. The equipment offered was "of the Company's standard design offered to meet the functional requirements of the Engineer's specifications . . ." It was again necessary for the contractors to evaluate the technical aspects of the proposal to assure compliance with the owner's actual requirements as set out in the Invitation for Bids.

The proposal provided that once prices were furnished, they would be firm for 30 days from the date of the proposal, which again would be insufficient time for the successful contractor to place an order.

The warranty offered with the proposal was again for a one year period commencing with the date of shipment.

Proposal E -- This proposal offered to furnish bio-clarifiers, gear lift pumps, sludge thickeners, a scum system and sludge holding tanks. The proposal failed to indicate whether the items were offered in conformance with the plans and specifications. It was therefore necessary for prospective bidders to review in detail the technical aspects of the proposed equipment to attempt to make that determination.

The General Conditions of the proposal provided that the proposal would not result in a binding contract until it was first accepted by the contractor, and was then approved by an authorized officer of the manufacturer. It provided no assurances that the manufacturer would be bound to all of the terms of the proposal.

The guarantee offered by the manufacturer was for 18 months after delivery or 12 months after the equipment was to be put in service, whichever was earlier.

Proposal F -- This supplier offered to provide instrumentation as specified in the plans and specifications. The warranty contained in the proposal was for one year from shipment. Payment was required under the proposal within 30 days from the invoice date. This quotation was generally in good order from a technical standpoint, but, again, it was unpriced until shortly before bid opening.

Proposal G -- This manufacturer proposed to furnish the scum system. The equipment purportedly was offered in accordance with the owner's specifications, but also provided that "[m]inor dimensional and equipment design changes will undoubtedly occur, depending upon the final details required for the [manufacturer's] standard design."

The proposal provided for a 20 percent payment at the time of drawing submittal and a final payment of the remaining 80 percent of the purchase price upon shipment of the equipment regardless of the payment terms contained in the prime contract.

Proposal H -- This proposal offered to furnish pumps, but without assurance that the pumps would meet the required plans and specifications. Again, it was necessary for prospective bidders to technically evaluate the equipment to determine whether the equipment would meet the owner's requirements.

The proposal also provided that for any delay in furnishing the equipment that was not the fault of the manufacturer, the price would have to be increased one and one-half percent per month. This of course, placed additional risks upon prospective contractors which could not be evaluated effectively at the time of bidding.

The terms and conditions portion of the proposal provided that the proposal was not an offer, and that any resulting contract would be subject to final acceptance by an authorized representative of the manufacturer.

The proposal offered a warranty for a maximum period of 18 months from the date of shipment.

Proposal I -- This supplier offered to provide a partial sand filter system. However, the proposal explicitly provided that the specifications of the owner's engineers were not to be a part of the purchase order and that any reference to those specifications was to be considered as a mere convenience for reference purposes only.

The proposal provided that the manufacturer's representative would contact prospective bidders "prior to the bid opening to furnish you with pricing and answer any questions you might have."

The proposal further provided that the manufacturer would have the right, at its sole discretion, to make partial shipments and that the shipment date contained in the proposal was subject to revision or postponement at the discretion of the manufacturer.

Any contract that might follow from the proposal was subject to the approval of an officer of the manufacturer's representative.

Proposal J -- This corporation offered to provide the waste activated sludge pump, vertical turbine pumps and super natant pumps. A price escalation provision was included in the proposal. The proposal provided that prices would be telephoned to bidding contractors a day or two before the bid opening.

The warranty provided by the proposal was for one year from the date of shipment.

Proposal K -- This proposal offered to provide incineration equipment purportedly in accordance with the owner's plans and specifications. Prices were to be telephoned to prospective contractors on the morning of the bid opening.

Proposal L -- This manufacturer offered to provide the sludge combustion equipment. However, its proposal provided that the information that was to be submitted with bids would be furnished at a later date prior to bid opening. The proposal also provided that the price, which again was to be furnished later, would be valid for only 45 days from bid opening, and it was conditioned upon certain events including the receipt of notice to proceed within 14 days of the formal execution of the contract.

Proposal M -- This manufacturer offered to furnish lime feeders, slakers, and lime slurry storage tanks, process metering pumps and partial instrumentation. The proposal made no reference to the plans and specifications. Instead, it contained 13 pages of the manufacturer's description of what it proposed to furnish.

In addition, the proposal provided 30 days for acceptance. It also contained a price escalation provision.

> Proposal N -- This supplier offered to furnish lime feeders and slakers, process metering pumps and chlorination equipment, without assurance that the offered equipment would be in compliance with the plans and specifications. The proposal provided a 60 day acceptance period, and specified that if shipment could not be made within 400 days, the price would be revised. Payment terms included the requirement for full payment within 30 days of shipment and title was to remain in the seller.

Each of the above proposals contained technical specifications in varying detail. Most of these typical proposals required prospective bidders to make techical evaluations of the equipment offered, even though it would have been more appropriate for the manufacturer, as the possessor of the supposed expertise and the manufacturing knowledge to state whether its equipment complied with the owner's plans and specifications.

None of the proposals contained prices. Almost everyone of the proposals included a section describing work that was not covered by the proposal so that it was also necessary for prospective bidders to evaluate those exceptions to assure that all interface or tie-in work was covered in its estimate either through the work of a supplier or someone else. All of this placed inordinate burdens upon prospective contractors. More importantly, it effectively prevented the finalization of any prospective purchase orders before prime contract bidding. The result had to be negotiations following bid opening. If not successful with these negotiations the contractor must then go to another manufacturer.

Post bid-opening negotiation would not be necessary if the manufacturers would offer equipment meeting the owner's plans and specifications, and if the manufacturers would provide their price quotations to prospective contractors so that an effective evaluation and negotiation of work scope could be performed before bid opening.

Given the present pattern of marketing waste water equipment, the only result of requiring general contractors to list equipment suppliers in their bids to EPA grantees would be to "lock-in" the general contractor to a single supplier, who could, after bid opening, demand whatever price it desired to bring its non-conforming proposal into compliance with the owner's specifications.

Regulations Purporting to Eliminate Bid Shopping and Peddling Would Create Severe Administrative Problems

Even assuming, for purposes of argument, the existence of a real bid shopping problem in the wastewater equipment manufacturing market, the promulgation and application of regulations to supposedly control such activity would give rise to far greater problems than the regulations would cure.

First, regulations amenable to implementation by grantees would have to be prepared. Such regulations would have to be added to the lengthy list of existing administrative burdens imposed on grantees. Implementation efforts would have to include special bid invitation preparation precautions. Additional pre-award evaluation efforts would have to be undertaken by grantees to assure the accuracy of listings made by bidders. The administration of post-award substitution requests would also add to the burdens imposed on grantees.

The required listing of subcontractors and equipment suppliers would undoubtedly give rise to bid protests, just as it has when it has been utilized in the direct federal procurement arena. Noncompliance with the letter of the listing requirements will often result in the rejection of bids as nonresponsive with the result that otherwise responsive and low bids will have to be discarded in favor of higher priced bids. In addition, expensive delays in making contract awards will inevitably ensue.

Situations giving rise to bid protests will include questions of (1) whether a listed subcontractor will perform all of the work for which it is listed (46 Comp. Gen. 194 [1966]); (2) whether there is a clear relation in the invitation for bids between the listed subcontract work classification and the particular, applicable portion of the technical specifications in the contract (50 Comp. Gen. 839 [1971]; (3) whether a listed subcontractor is qualified to perform the work for which it is listed (46 Comp. Gen. 829 [1966]; 45 Comp. Gen. 84 [1965]); (4) whether the listing of a proposed subcontractor by its common designation or nickname rather than by its proper name is satisfactory (51 Comp. Gen. 831 [1972]; 50 Comp. Gen. 295 [1970]); (5) whether the listing of two separate subcontractors for one category of work, where both are to perform a portion of the listed work, is satisfactory (Comp. Gen. Dec. B-178627 [September 14, 1973]); (6) whether a listed subcontractor can further subcontract to others a portion of the work for which it is listed (49 Comp. Gen. 120 [1969]); (7) whether a bidder can list itself for certain identified subcontract work (46 Comp. Gen. 156 [1966]); (8) whether a bidder can list a subsidiary or a closely related company for certain listed subcontract work (47 Comp. Gen. 644 [1968]); (9) whether the bidder can list alternative proposed subcontractors with its bid (54 Comp. Gen. 159 [1974]); and (10) whether the classification of work for which a listing of a subcontractor is required meets the cost percentage requirement necessitating the separate listing (51 Comp. Gen. 264 [1971]; Comp. Gen. Dec. B-179947 [April 5, 1974]).

All of these issues and others have been raised in federal government contract protests, and many decisions on those protests have been rendered by the General Accounting Office. However, while those decisions may serve as precedent for grantees in determining protests involving the listing requirements, there can be no assurance that grantee agencies and local courts will follow such decisions. It can only be certain that the listing requirements will give rise to an added multitude of bid protests. Each bid protest revolves around its own specific facts, and no two situations are alike, with the result that there will inevitably be a multiplication of administrative proceedings and litigation if a listing requirement is imposed.

In addition to bid protests, contract claims and litigation will flow from the criteria permitting substitution of suppliers that must accompany listing requirements. Standards for substitution will have to be promulgated, such as those provided by the General Services Administration (GSPR ¶ 5B-2.202-71), and those standards will have to be reasonably applied. Improper application of the substitution standards will result in the grantee being exposed to court action and resulting damages. For example, in Meva Corp.

v. *United States*, 206 Ct. Cl. 203 (1975), the United States Court of Claims dealt with a disastrous situation arising from the refusal of a contracting agency to permit a general contractor to substitute another subcontractor for a subcontractor originally listed in the general contractor's bid. The general contractor ultimately received a recovery of $600,000 from the Government because of the refusal of the agency to permit the substitution. It is instructive that the agency involved (The Interior Department) thereafter dropped the listing requirement.

No Federal Government Agency Has Required the Listing of Equipment Suppliers With Prime Contract Bids

While two Federal government agencies have required the listing of proposed subcontractors in construction contract bids, no Federal government agency has ever required bidders to list equipment suppliers. Today, the General Services Administration, which is the only Federal agency presently requiring a listing of proposed subcontractors requires only the listing of principal subcontractors, including those for the ". . . mechanical, electrical, and elevator and/or escalator divisions . . .", as well as ". . . all other general *construction* categories of work in the project specifications . . ." GSPR ¶ 5B-2.202-70. The listing requirement is not extended to suppliers of equipment or to suppliers to subcontractors or to contract levels below the first tier subcontract level.

The Imposition of Requirements for the Listing of Principal Subcontractors and Equipment Suppliers Would Impinge Upon the Historic and Time-Honored Responsibility of the General Contractor to Freely and Independently Manage Its Activities

The imposition of regulations and requirements regarding the listing of subcontractors and suppliers would place both EPA and the grantee agency in the center of the contractor-subcontractor-supplier relationship. The general contractors of America have historically demonstrated their ability to manage their own subcontractor and supplier relationships, and the imposition of added governmental interference in that relationship can only serve to frustrate that demonstrated ability. Therefore, general contractors must adamantly oppose any intervention by a Federal or local agency in those relationships.

The Brief Submitted by the Waste and Wastewater Equipment Manufacturers Association Advocating the Adoption of Subcontractor and Supplier Listing Requirements Does Not Justify the Need for Such Requirements

The brief submitted by the Waste and Wastewater Equipment Manufacturers Association does not justify the need for bid listing regulations. A large portion of the brief is devoted to the age-old arguments against bid shopping and bid peddling. However, the brief ignores the real problems that presently exist in the waste equipment supplier industry. Those problems, including the refusal of manufacturers to offer strict compliance of their products with the requirements of the owner's plans and specifications, including all terms and conditions as well as technical specifications, as well as refusal of the manufacturers to provide prices with their quotations within a time frame permitting some negotiation with prospective suppliers regarding price and work scope, are the sole responsibility of the equipment manufacturers.

Any problems that now exist in this field could be easily resolved if waste equipment suppliers would follow the practices of other nechanical and electrical suppliers and subcontractors, and give firm quotations for the specific items required by the owner's specifications sufficiently in advance of bid opening to permit a meaningful evaluation of such quotations for use in the general contractors' bids.

AGC's Recommendation Regarding the Proposed Listing of Principal Subcontractors and Equipment Suppliers

AGC recommends that efforts be made to require specialty equipment manufacturers to offer products in strict compliance with the owner's required plans and specifications. Efforts also should be made to persuade the manufacturers to provide price quotations sufficiently in advance of bid opening so that meaningful evaluations of the work scope to be undertaken by the supplier and its anticipated cost can be made prior to bid submission.

The proposed listing of subcontractors and equipment suppliers does not go to the heart of the problem, and AGC is adamantly opposed to such a listing requirement.

In summary, AGC recommends that the Administrator advise Congress that problems exist in the equipment supplier market because of practices in the free enterprise marketplace that are the sole responsibility of the equipment manufacturers and that the listing of subcontractors and suppliers under the construction grants program would not solve such problems, but would impose greater burdens and regulations on the EPA and the state and local government grantees.

Respectfully submitted,

Associated General Contractors
of America

J M Sprouse

James M. Sprouse
Executive Vice President

NICHOLAS J. MELAS
PRESIDENT

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January 6, 1978

Mr. Harold P. Cahill, Jr., Director
Municipal Construction Division (WH-547)
U.S. Environmental Protection Agency
401 "M" Street, S.W.
Washington, D.C. 20460

1978
W-H547

Dear Mr. Cahill:

The WWEMA brief on bid shopping and bid peddling provided to the MAG members at the December 14th meeting has, in response to your request, been reviewed by my staff and myself.

The proposal for a regulation mandating identification of subcontractors in bid documents for contracts funded by the U.S. EPA should be rejected. However, we feel that grantees should be allowed the option of including such requirements in their bid documents in whatever manner they deem necessary to either comply with State and local requirements or to mitigate potential effects of bid shopping and bid peddling on bid prices for such contracts.

The documents appended to the WWEMA brief present arguments which do and do not support the need for such regulation. As may be expected, the WWEMA brief presents the arguments in support of such regulation. Despite the argument that there is de facto coercion applied by prime contractors which forces subcontractors to respond to the bid shopping tactics, it is evident that without their cooperation bid shopping would not be a problem. Contentions expressed by parties in litigation cited in the brief and in the appendices are representations without confirmation. As prime contractors and subcontractors report diametrically opposite experiences, the proposed regulations could only achieve a reduction of alleged abuses by one group. We cannot accept arguments which place all the blame on the prime contractors. Thus, we cannot support a regulation which presumes that such is the case.

It is difficult to refute the arguments contained in the WWEMA brief without seeming to case aspersions on members of that industry; even though such a refutation may be in a purely hypothetical sense. At the risk of alienation, however, I must point out what I feel to be relevant factors opposing the industry's position.

The brief states that a prohibition against bid shopping will enhance pre-bid competition and lead to lower prices. Information submitted with the brief indicates that there is an apparent effort by at least some members of the industry to prevent bid shopping before or after award to the prime contractors. Experience shows that submittals of bids by subcontractors generally occurs a very short time before the bid opening. Prime contractors are forced to accept bids at the last moment with little or no opportunity to determine if the low bidder fully understands the requirements of the contract documents or if the equipment to be provided meets the specifications. Given this situation, it is difficult to see how primes can obtain better competitive subcontract bids before bid opening by the application of the proposed regulation.

With respect to lower prices, the brief argues in every possible direction and frequently contradicts itself in this respect. For example, the brief argues that the primes reduce their bids in anticipation of reducing their costs by bid shopping subsequent to award. As this is somewhat supportive of bid shopping, it then argues that it is not clear that primes actually do reduce their initial bids in anticipation of lower costs [illegible] be achieved by bid shopping. The brief argues that subcontractors "puff" their bids to the prime in anticipation of being forced [illegible] reduce their bids subsequent to award and that reductions from their initial bid can be accommodated while maintaining the level of profit which they consider necessary. They then argue that the award price is inflated and the primes, after bid shopping, achieve a higher profit figure than they should. In their regulation, however, they produce no proposal for preventing "puffing" of bids if such a regulation were imposed. Obviously, if a prime contractor can be a successful bidder in spite of "puffed subcontractor's bids", the same can occur if the regulation were adopted and then the subcontractors would be making a disproportionate profit. The brief is quite clear that it is not only [illegible] matter of higher prices to the grantee and the U.S. EPA, but that the present situation allows prime contractors to get monies that the subcontractors feel should be theirs.

Another argument is that bid shopping pressures subcontractors to do substandard work or to work at a loss. At the risk of being cynical, reduced costs and, presumably, larger profits seldom are secondary to any other factor in the prosecution of work in today's society. The argument can be made that pressures to increase profits or reduce losses--at any point in the project--by primes or by subcontractors is a problem irrespective of the bidding process. A major portion of the construction residency manpower and expense is directed towards prevention of detrimental shortcuts, improper procedures, inferior or non-specification materials, and other items which would produce an inferior project. If this were not the case, then the argument that bid shopping can result in shoddy work may be valid. Equipment or installations performed under a "no bid shopping regulation" will not provide guarantees for the grantee or the U.S. EPA of the quality of work to be performed or the material to be supplied. The only such guarantee is a rigorous inspection of work and assurance of complete adherence to the specifications for materials and equipment.

For obvious reasons, my response to the WWEMA brief does not debate, point by point, the statements therein. As may be expected, they reflect assumptions which place their position in the best possible light. However, many are not substantiated and reflect that one viewpoint. While generally agreeing that the practices of bid shopping and bid peddling are detrimental, the proposed regulation is one-sided and provides the opportunity for abuses by the nonregulated party in this two-party activity.

One other factor which influences my opposition to the WWEMA proposal is the potential delays associated with awards of contracts under such constraints. Prior to formal award of a contract, all subcontractors and equipment to be provided would have to be reviewed for acceptability. It would appear that the refusal to accept a subcontractor or equipment submittal could result in a withdrawal of bid by the prime contractor or at least delays in obtaining an acceptable substitute. If one assumes that the unacceptability occurred because of a non-specification subcontract bid, it must be assumed that a substitute would result in a cost increase to the prime contractor. Would the grantee then be required to escalate the prime's bid by that additional cost?

Under most contracts administered by the District today, subcontractors need not be identified until formal award of the contract has been made. Subcontractors must then be approved as the work progresses. If a subcontractor is found unacceptable to the District, the contractor is forced to provide a substitute, acceptable to the District, within the bid price. Likewise, equipment submittals must meet specifications or a substitute provided at no additional cost. The leverage which the District has after award of the contract is significantly greater than that which would exist if such determinations were made prior to formal award.

I am aware that a number of AMSA members require submittal of subcontractors and equipment suppliers with the bid. In some circumstances, this District may find it to be advantageous also. In fact, such a requirement is placed on prime contractors to identify minority and small business contractors and the dollar value of the work to be subcontracted to each with the initial bid documents. This requirement is intended to assure compliance with the District's Affirmative

Action Program in determination of the lowest responsible bidder. The exercise of such an option does, in my opinion, provide ample opportunity for flexibility by grantees in determining the mechanisms they will utilize in obtaining bids for their projects.

Further, addressing the practical problems which arise out of the procurement process, the proposed regulation would promote delays and time consuming disputes. The Metropolitan Sanitary District's "Purchasing Act" as well as most other municipal procurement regulations provide for an award to the lowest responsible, responsive bidder. As long as we are able to equate the proposals of contractors on even terms, that is price, we are following the letter and spirit of our Purchasing Act. It is when bidders are required to submit additional information that we have had time consuming protests. This would be particularly true if suppliers and subcontractors were able to file protests, since under the Federal Regulations they would have "an adversely affected direct financial interest" CFR § 35.939(a). Just a little imagination is needed to realize the number of protests that could be filed, contrary to the unsupported assurances set forth on Page 17 of WWEMA's brief.

Finally, I am told by our legal staff at the Metropolitan Sanitary District that the provisions of Section (G) of the "Listing of Subcontractors Materials and Equipment Suppliers" would most certainly be contrary to the current law relating to penalties and be declared void and unenforceable. The assessment of a 20% penalty even to the most casual observer seems arbitrary and capricious.

We, therefore, urge the Agency to reject the WWEMA proposal or any similar attempt to limit grantees' abilities to establish contract requirements which would best serve the interests of their agencies.

Very truly yours,

Bart T. Lynam
General Superintendent

BTL:HM:dw

cc:
MAG Members
AMSA - R. Linton
Mr. Fred Harper

75-17

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E. J. PELTIER
CONSULTANT

January 9, 1978

Mr. Harold P. Cahill, Jr.
Municipal Construction Division
U. S. Environmental Protection Agency
401 "M" Street, S. W.
Washington, D. C. 20460

Dear Hal:

This is in reply to your request to comment on WWEMA's proposed regulation in regards to bid shopping.

Except for the suggested amount of the contract and percentages in the resolution, I see nothing too drastic in their suggestions.

I question whether paragraph (G) is necessary.

I am enclosing actual specifications on what MSD in St. Louis has been doing for over ten years. This has worked very well with perhaps less than five requests for substitution.

Also enclosed is the A&E's estimate and approved equipment list, contractors bid tabulation with their equipment and subcontractor selections.

Hope this will give you some help on how to proceed on this.

Sincerely,

E. J. Peltier

Enclosures

JAN 11 1978

NH-547

Encl (1)

SUBCONTRACTORS

List of Major Subcontractors

The undersigned expressly agrees that:

1. if awarded a contract as a result of this Bid, the major subcontractors used in the prosecution of the work will be those listed below, and

2. the following list includes all subcontractors who will perform work representing approximately three and one-half (3-1/2) percent or more of the Total Base Bid.

3. The Bidder represents that the subcontractors listed below are financially responsible and are qualified to do the work required.

Category	Name of Subcontractor	Address

BIDDING SCHEDULE

1. Unit Price Construction Items

ITEM NO. 1

650 linear feet rock anchors, complete in place.

at ______________________ Dollars & ______________________ Cents
(in writing) (in writing)

$ ______________________ $ ______________________
(in figures) per linear foot Total (in figures)

ITEM NO. 2

12 each rock anchor tests complete.

at ______________________ Dollars & ______________________ Cents
(in writing) (in writing)

$ ______________________ $ ______________________
Each (in figures) Total (in figures)

ITEM NO. 3

220,000 cubic yards of rock excavation.

at ______________________ Dollars & ______________________ Cents

$ ______________________ per cubic yard $ ______________________
(in figures) Total (in figures)

2. Unit Price Items for Foundations, Protection and Backfill

ITEM NO. 4

15 thousand feet board measure of timber sheeting and bracing ordered left in place.

at ______________________ Dollars & ______________________ Cents
(in writing) (in writing)

$ ______________________ per MFBM. $ ______________________
(in figures) Total (in figures)

ITEM NO. 5

10,000 cubic yards of granular foundation material complete in place.

at ______________________ Dollars & ______________________ Cents
(in writing) (in writing)

$ ______________________ per C.Y. $ ______________________
(in figures) Total (in figures)

ITEM NO. 6

300 cubic yards of concrete pipe cradle or encasement complete in place.

at ____________________ Dollars & ____________________ Cents
(in writing) (in writing)

$ ____________________ per C.Y. $ ____________________
(in figures) Total (in figures)

ITEM NO. 7

2,000 cubic yards of sand or gravel backfill

at ____________________ Dollars & ____________________ Cents
(in writing) (in writing)

$ ____________________ per C.Y. $ ____________________
(in figures) Total (in figures)

B. LUMP SUM ITEMS

ITEM NO. 8

Base bid for the balance of all the work included for the construction of the Lemay Wastewater Treatment Plant - Aeration Tanks, Service Building and Instrumentation based on completion of all work in accordance with the contract documents, the Lump Sum of

____ Dollars
(in writing)

and ____________________ Cents $ ____________________
(in writing) (in figures)

Total Base Bid, Lemay Wastewater Treatment Plant -
Aeration Tanks, Service Building and Instrumentation

The sum of Items No. 1 through No. 8 inclusive is

____ Dollars
(in writing)

and ____________________ Cents
(in writing)

Total Base Bid, Lemay Wastewater Treatment Plant - Aeration Tanks, Service Building and Instrumentation $ ____________
(in figures)

Cost Basis for Changes

The following supplementary schedule of unit prices will apply in the event that the District orders in writing additions to or deductions from the work detailed on the Contract Drawings as covered by Lump Sum Item No. 3 in the Bidding Schedule, Lemay Wastewater Treatment Plant - Aeration Tanks, Service Building and Instrumentation.

Supplementary Schedule of Unit Prices

Type of Work	Unit	Unit Price
Excavation Earth (dry)	C.Y.	$
Excavation Earth (wet)	C.Y.	$
Floor Concrete Against Ground	C.Y.	$
Formed Concrete (walls, including Forms)	C.Y.	$
Formed Concrete (Slabs, Beams, Columns, etc. including Forms)	C.Y.	$
Reinforcing Steel	Lbs.	$
Extra Cast Iron Pipe and Fittings	Lbs.	$

It is understood and agreed by the undersigned that the District reserves the unrestricted privilege to reject any or all of the foregoing unit prices in this paragraph which it may consider excessive or unreasonable, or to accept any or all of them, pursuant to the provisions of the General Conditions, as unit prices applicable in the event additions to or deductions from the work to be performed on Lump Sum Item No. 3, Lemay Wastewater Treatment Plant - Aeration Tanks, Service Building and Instrumentation, are ordered by the District.

Bid Conditions

It is expressly understood and agreed that the foregoing total base bid is the basis for establishing the amount of the bid security on this bid on the Lemay Wastewater Treatment Plant - Aeration Tanks, Service Building and Instrumentation and that this total base bid is not to be construed to be a Lump Sum Bid. It is further understood that quantities in the bidding schedule for unit price items are approximate only, and that payment of a contract will be made only on the actual quantities of work completed in place, measured on the basis defined in the General Conditions, Contract Specifications or other Contract Documents.

The undersigned has carefully checked the above bidding schedule against the Contract Drawings and Specifications and other Contract Documents before preparing this bid and accepts the said quantities to be substantially correct, both as to classification and amount, and as correctly listing the complete work to be done in accordance with the Contract Drawings, Specifications and other Contract Documents.

Major Equipment Items

The total base bid as set forth in the bidding schedule includes the cost of major equipment items as supplied by the following manufacturers.

Centrifugal Fans ______________________________

Air Diffusion Equipment ______________________________

Motor Control Centers ______________________________

Instrumentation and Computer Equipment ______________________________

Lower Meramec Treatment Plant
Auxiliary Treatment Facilities
Construction Contract No. 62
Aeration Tanks, Service
Building & Instrumentation

Metropolitan St. Louis Sewer District
St. Louis, Missouri
Mississippi River Subdistrict

RECORD OF BIDS RECEIVED

BIDS RECEIVED September 8, 1977
UNTIL 2:00 PM CDST

CONSOER TOWNSEND & ASSOCIATES
CONSULTING ENGINEERS
CHICAGO, ILLINOIS

CERTIFIED AS CORRECT COPY OF ALL BIDS RECEIVED
CONSOER TOWNSEND & ASSOCIATES
BY [illegible]

BIDDERS DESIGNATION →	1	2	3	4	5	6	7	8
BIDDERS IDENTIFICATION →	[illegible] Co. Inc. 4607 [illegible] Ave St. Louis, Mo. 63116	[illegible] Const Co. Inc. 6000 Kemper St. Louis, Mo. 63139	J.S. Alberici Const Co. Inc. 2150 Kienlen Ave St. Louis, Mo. 63121	[illegible] Const Co 8510 [illegible] Rd St. Louis, Mo. 63144	McCarthy Bros Const Co 1341 N. Rock Hill Rd St. Louis, Mo. 63144	Fruin Colnon Cont Co 1706 Olive St St. Louis, Mo. 63103	G.L. Tarlton Cont Co 5500 West Park St. Louis, Mo. 63110	Titan-Midwest Const Corp 100 Progress Parkway Maryland Heights, Mo. 63043
BID SECURITY: CERTIFIED CHECK / CASHIERS CHECK / BIDDERS BOND	5%	5%	5%	5%	5%	5%	5%	5%

BIDDING SCHEDULE

ITEM NO.	DESCRIPTION	QUANTITY UNIT	1 UNIT PRICE	1 TOTAL	2 UNIT PRICE	2 TOTAL	3 UNIT PRICE	3 TOTAL	4 UNIT PRICE	4 TOTAL	5 UNIT PRICE	5 TOTAL	6 UNIT PRICE	6 TOTAL	7 UNIT PRICE	7 TOTAL	8 UNIT PRICE	8 TOTAL
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
	TOTAL BASE BID			6,896,300.00		6,906,279.00		7,771,459.00		7,999,730.00		8,019,567.00		8,345,199.00		8,440,377.00		8,732,175.00

SUPPLEMENTARY SCHEDULE OF UNIT PRICES

ITEM	TYPE OF WORK	UNIT	1	2	3	4	5	6	7	8
			PRICE PER UNIT							
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]

COMBINATION AWARDS

COMBINATION OF CONTRACTS	AMOUNT OF DEDUCTION							

STARTING AND COMPLETION

START
COMPLETE

REMARKS
* Unit prices are in error
+ Unit price extension in error

SHEET NO. 1 OF 2

Encl. 3

[illegible]
Secondary Treatment Facilities
Construction Contract [illegible]
Aeration Tanks, Service
Building & Instrumentation

Metropolitan St Louis Sewer District
St Louis, Missouri
Missouri River Subdistrict

RECORD OF BIDS RECEIVED

CONSOER TOWNSEND & ASSOCIATES
CONSULTING ENGINEERS
CHICAGO, ILLINOIS

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CONSOER, TOWNSEND & ASSOCIATES
BY [illegible]

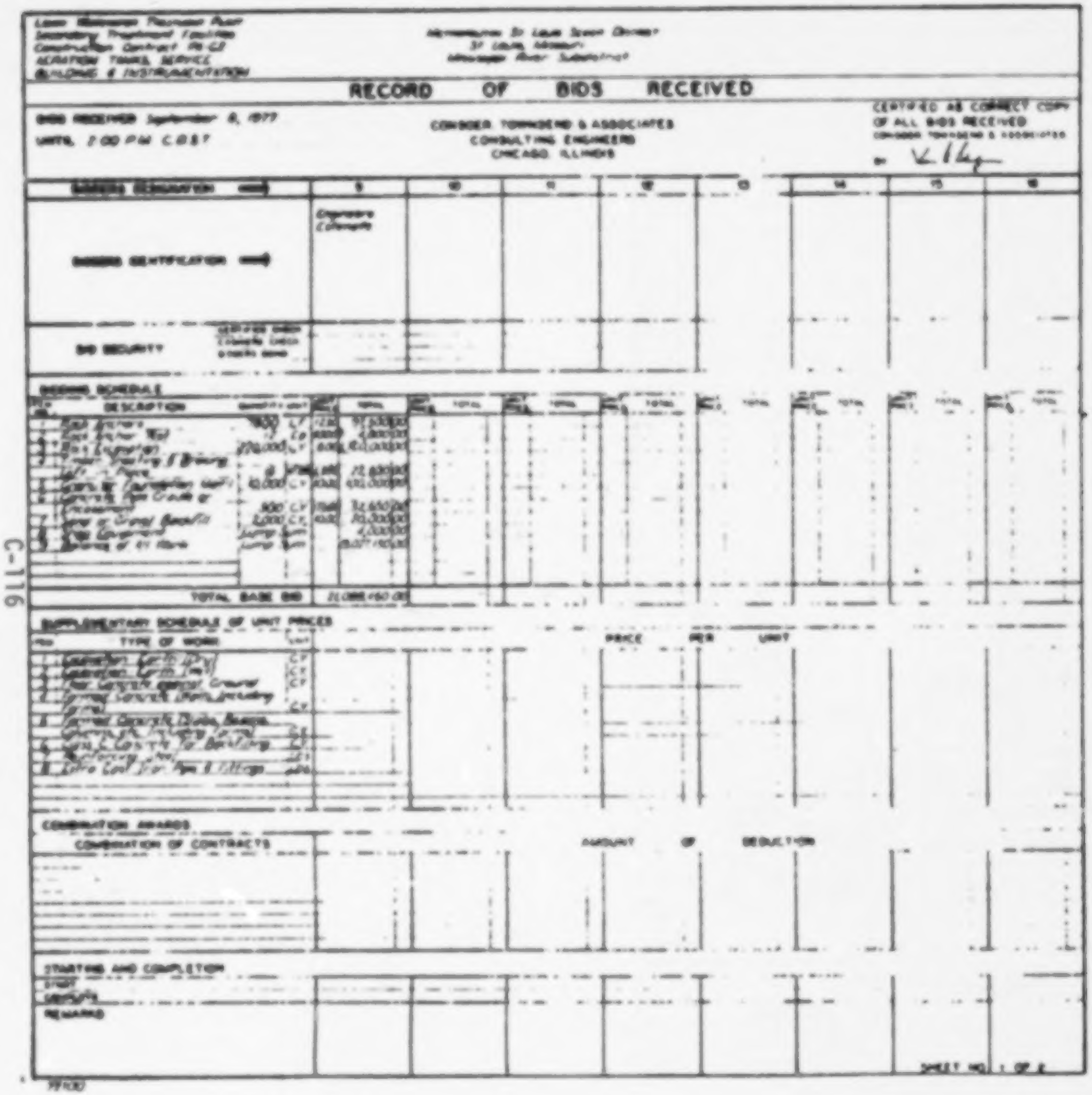
BIDS RECEIVED November 8, 1977
UNTIL 2:00 PM CST
MAJOR EQUIPMENT ITEMS

		BIDDERS DESIGNATION →	[illegible] 1	[illegible] 2	[illegible] 3	[illegible] 4	[illegible] 5	[illegible] 6	[illegible] 7	8
						INSTALLED	COST			
		DESCRIPTION AND SUPPLIER								
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]		Fischer & Porter	Fischer & Porter		Fischer & Porter	Fischer & Porter	Fischer & Porter	Fischer & Porter
[illegible]	[illegible]	Instrumentation & Computer	Fischer & Porter			Fischer & Porter				[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	Dresser	[illegible]	Dresser	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	Dresser	Dresser	Dresser	Dresser	Dresser	Dresser	[illegible]
		Major Subcontractors								[illegible]
		[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	
		[illegible] Electrical [illegible]						[illegible]	[illegible]	

[illegible]

ENCL. 3

Encl 2



Lower Meramec Treatment Plant
Secondary Treatment Facilities
Construction Contract [illegible]
AERATION TANKS, SERVICE
BUILDING & INSTRUMENTATION

Metropolitan St. Louis Sewer District
St. Louis, Missouri
[illegible] River Subdistrict

RECORD OF BIDS RECEIVED

BIDS RECEIVED September 8, 1977
UNTIL 2:00 PM C.D.S.T.

CONSOER, TOWNSEND & ASSOCIATES
CONSULTING ENGINEERS
CHICAGO, ILLINOIS

CERTIFIED AS CORRECT COPY
OF ALL BIDS RECEIVED
CONSOER TOWNSEND & ASSOCIATES
BY

BIDDERS DESIGNATION → 9 10 11 12 13 14 15 16

BIDDERS IDENTIFICATION →

BID SECURITY: CERTIFIED CHECK / CASHIER'S CHECK / BIDDER'S BOND

BIDDING SCHEDULE
ITEM NO. | DESCRIPTION | QUANTITY & UNIT | UNIT PRICE | TOTAL

TOTAL BASE BID [illegible]

SUPPLEMENTARY SCHEDULE OF UNIT PRICES
ITEM | TYPE OF WORK | UNIT | PRICE PER UNIT

COMBINATION AWARDS
COMBINATION OF CONTRACTS | AMOUNT OF DEDUCTION

STARTING AND COMPLETION
START
COMPLETE
REMARKS

SHEET NO. 1 OF 2

Lemay Wastewater Treatment Plant
Secondary Treatment Facilities
Construction Contract PA-C2
AERATION TANKS, SERVICE
BUILDING & INSTRUMENTATION

Metropolitan St. Louis Sewer District
St. Louis, Missouri
Mississippi River Subdistrict

RECORD OF BIDS RECEIVED

BIDS RECEIVED September 8, 1977
UNTIL 2:00 P.M. C.D.S.T.
MAJOR EQUIPMENT ITEMS - ACCEPTABLE MANUFACTURERS

CONSOER TOWNSEND & ASSOCIATES
CONSULTING ENGINEERS
CHICAGO, ILLINOIS

CERTIFIED AS CORRECT COPY
OF ALL BIDS RECEIVED
CONSOER TOWNSEND & ASSOCIATES
BY

[illegible]	NO.	DESCRIPTION AND SUPPLIER		INSTALLED COST
[illegible]	1	Centrifugal Pumps	[illegible]	
[illegible]	2	Air Diffusion Equipment	[illegible]	
[illegible]	3	Motor Control Centers	[illegible]	
[illegible]	4	Instrumentation & Computer Equipment	[illegible]	
[illegible]	5	Butterfly Valves (18 inch and larger)	[illegible]	
[illegible]	6	Butterfly Valves	[illegible]	
[illegible]	7	Gate Valves (18 inch and larger)	[illegible]	

SHEET NO. 2 OF 2

72100

15042 North 2nd Street
Phoenix, AZ 85022

January 10, 1978

Mr. Harold P. Cahill, Jr.
Director
Municipal Construction Division (WH-547)
United States Environmental Protection Agency
401 "M" Street, S.W.
Washington, D. C. 20460

Dear Mr. Cahill:

Here are some comments on WWEMA's Prepared brief on "Anti-Bid Shopping and Bid Peddling Regulations."

I feel that if P.L. 92-500, Section 204(6) is changed, the grant projects will be tied up with more bid protests and red tape.

P. L. 92-500, Section 204(6) is adequate as stated.

Sincerely yours,

Patricia A. Williams

(Mrs.)Patricia A. Williams
MAG

cc: Mr. Eugene Peltier
Consultant,
Sverdrup & Parcel & Assoc., Inc.
8 Ladue Forest
St. Louis, MO 63124

JAN 24 1978

W-4547

Straco Construction Company
CONTRACTORS

1500 PARK BOULEVARD, CAMDEN, NEW JERSEY 08103
609-963-5060

Henry C. Strahle
President

JOAN S. ARNOLD
Vice-President
609-829-7784

January 13, 1978

Mr. Harold P. Cahill, Jr., Director
Municipal Construction Division (WH-547)
U. S. Environmental Protection Agency
401 "M" Street, S. W.
Washington, D. C. 20460

Dear Mr. Cahill:

RE: Request for comment on brief submitted by the Waste and Waste-Water Equipment Manufacturers Associations, Inc. advocating the adoption of a regulation to eliminate bid shopping and bid peddling.

I cannot agree that an anti-bid shopping and bid peddling regulation as put forth in the brief of the WWEMA can be administratively workable, would minimize protests, and would not burden the EPA or its grantees. On the contrary, there are many projects where listing of subcontractors and suppliers has been required by the contract documents and these have given rise to numerous protests which have delayed award of the project.

In discussion with other contractors I find firm opposition to listing in view of the fact that in many instances quotations received from suppliers are not comparable with respect to quality, delivery date, terms of payment, and degree of shop fabrication to actual field erection costs.

I am told that often the equipment manufacturer sends in a scope letter which puts all the performance responsibility basically on the contractor, and places limitations as to guarantees, leaving the contractor without recourse. Often parts lists are sent by the equipment manufacturer rather than submitting required specification numbers.

To touch on points listed by WWEMA in proposed regulation - "Listing of Subcontractors, Materials and Equipment Suppliers" - Items A to H (condensed)

(A) Submitting of name of firm with whom contractor proposes to contract for performance of each category.

COMMENT: When forced to list, owner is assigning to the contractor and should take the responsibility for the assignment. Is the owner willing to bear the burden, after contractor submits listing, for late deliveries and defective materials ?

(B) Listing of all firms by bidder (including himself) and stating the portion (by percentage or narrative description) of the category to be furnished by each.

COMMENT: Delays and increased costs are incurred on projects where unnecessarily complicated break-downs for equipment and subs must be incorporated into the bid. The detailed break-downs generate confusion and the potential for errors, which may result in unduly high or low bids and subsequent disputes or litigation.

(C) Failure to provide complete list shall cause the bid to be considered nonresponsive.

COMMENT: What if there are three suppliers available for a certain type of equipment, and only one of the three chooses to quote a contractor....and that at an outlandishly high price ? The contractor then is forced into a non-responsive position or a risk position. Does this not leave the unethical supplier in a position of controlling who will be low bidder and at what price ?

(D) Substitution / Termination

COMMENT: Included in (E) and (G) below.

(E) Conditions for Substitution:

COMMENT: Look at the climate of the bid situation....where subcontractors bids are submitted IMMEDIATELY prior to the time general contractor is to bid.

Referring to the VA. Law Review attached to the WWEMA brief:
(Page 1744): Often the prime did not have time to check the items included in the sub's bid during the hectic bid opening period and did not want to be bound until after they had had the opportunity to make such a check.
(Page 1745): Many times the general must use his best judgment to fill in the gaps between the price quoted by the sub or suppliers and the contract requirements and then, if successful, negotiate with the low sub to have a complete bid.
(Page 1746): Because of competitive pressures, a general cannot be criticized for using a low bid from an unknown sub. Yet it would not be sound to force him to deal with the sub if he is later found to be unreliable.

Under substitutions, the list would of necessity have to cover many more than the five points mentioned in the proposed regulation. To name a few....perhaps the sub cannot or refuses to meet the EEO standards; unknown to the prime, the sub is in arrears in payment to the union pension funds, causing work stoppage; a jurisdictional dispute ensues over the sub's work force. Many more can be added to complicate the prime's position with the sub and make it necessary for him to seek out an alternate.

(F) Prior to approval by Owner on substitution requirements.

COMMENT: Ten working days to handle substitution and challenges seems highly optimistic ! Further, will the subcontractor, who is not bound by a contract with the owner, accept the owner's determination as to the existence or non-existence of the grounds for substitution as final ?

(G) Owner's right to terminate the contract or assess a penalty when prime makes a substitution without obtaining prior approval.

COMMENT: Again, this right of owner to terminate the contract or assess a penalty will lead to more protests....more delays....possible litigation.

The EPA is justifiably seeking to protect the owner's interest in order to keep its own cost down. However, is it detrimental to the owner, once he has a firm low price reached through competitive bidding, that the contractor does all in his power to show a profit on the job ?

(H) Reduction of contractor's price if cost of equipment proposed to be substituted is lower....contractor's price shall be reduced by an amount equal to the net savings.

COMMENT: Are we to understand that net savings infers compensation to the contractor for loss of anticipated profit on this item ?

Regarding subcontractor protests, WWEMA states that protests will be an extremely minor problem under the proposed regulation. I disagree.....I believe it will spawn protests, causing added de The brief states on Page 18 that GSA has operated for several yea under regulations which require subcontractor listing, and has recently reviewed its regulations and reconfirmed their necessity.

I quote from a recent article in the Engineering News Record (June 23, 1977) :

" GSA QUESTIONS VALUE OF BID SHOPPING RULE

A controversial General Services Administration (GSA) rule that required bidders on its construction projects to submit a list of their [illegible]-contractors is under attack again, this time by GSA itself.

Contending that the rule delays contract awards and causes financial losses, GSA proposed in the June 1 FEDERAL REGISTER that it be eliminated.

The rule, adopted in 1963, was intended to prevent bid s[illegible]ping by the low bidder for lower subcontract prices. It requires bi[illegible]s to list their subcontractors on designated major categories of w[illegible] and any other category comprising 3.5% of the estimated contract price.

Since then, the rule has been attacked by general contractors, notably the Associated General Contractors, and defended by the subcontractors. GSA has remained silent until now.

According to GSA, the number of problems stemming from the rule 'have increased to the point where they are adversely affecting the GSA construction program.'

'Under the present rule,' says T. L. Dunn, director of GSA's contract systems division, 'unsuccessful bidders can delay a project indefinitely by claiming that there were irregularities in the low bidder's subcontractor list.' "

In conclusion I would suggest thought be given to the following:

To alleviate bid protests and speed up the EPA program, encourage lump sum bidding, with award on the lump sum price without the listing of equipment or suppliers.

If the owner wants competition, the engineer has an obligation to develop a standard of quality and hold to it. Terms and conditions should be complete and clear in the contractual provisions of the documents so that competitive bidding provides for competition.

Better bidding procedures would reduce overall costs. Prequalification prior to bid time would be desirable inasmuch as furnishing a list of manufacturers whose equipment would be approved by the engineer would tend to eliminate the possibility of manufacturers quoting equipment which did not meet specifications. Prequalification would stimulate competition whereas listing would stifle it.

Some contractors with whom I have spoken stated that listing of equipment manufacturers might possibly be acceptable to contractors when the equipment manufacturer is willing to state in his proposal that all equipment will be in strict accordance with plans and specifications and no FINE PRINT. If they are to be listed, they should assume the responsibility. However, since it is extremely difficult to fill out a bid form and list everything conceivable, something such as the 4 hour bid plan which has been used in the Carolinas would be necessary.

In conclusion, contractors are qualified to judge which of their potential subs or suppliers are qualified and competent, and should have the right as prime contractors to exercise this judgment.... the right to change either sub or supplier because of reasons he sees fit.

Yours very truly,

Joan S. Arnold

Joan S. Arnold

JSA/js
CC: MAG MEMBERS

78-3

WWEMA

Water & Wastewater Equipment
Manufacturers Association, Inc.
7900 Westpark Drive
Suite 304
McLean, Virginia 22101
703/893-1520

EXECUTIVE COMMITTEE
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Frank P. Sebastian, Jr.
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First Vice President
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Secretary
John M. Scheer
WWEMA

January 13, 1978

Mr. Harold P. Cahill, Jr.
Director
Municipal Construction Division
United States Environmental
  Protection Agency
401 M Street, S. W.
Washington, D. C. 20460

Dear Mr. Cahill:

In reference to your January 4, 1978 memorandum reminding MAG members of the January 15, 1978 deadline to submit comments on the bidding procedures used for construction contracting in the Construction Grants Program, I would like to take this opportunity to review this critical subject.

Attached is a copy of a paper entitled "Bidding Procedure," dated April 1, 1977, which was submitted to EPA by the MAG Subcommittee on Bidding and adopted by the MAG. The primary solution recommended in this paper is that the grantee should be allowed to require the general contractor to include in his bid the identification of all major subcontracts and major equipment suppliers.

Also attached is an excerpt from testimony presented by WWEMA before the House Committee on Public Works and Transportation last October in which WWEMA recommends the elimination of Section 204(a)(6) of the Clean Water Act or, alternatively, the addition of a new subparagraph (7) which would require a bidder to name the principal subcontractors and equipment suppliers.

In addition, I am attaching a paper prepared by WWEMA for discussion with EPA, AGC, ACEC and WWEMA Joint Committee in conjunction with conceptual agreement on prequalification and

JAN 19 1978

need to rectify contractors problems on equipment scoping terms and conditions and warranties. This paper also recommends the listing of manufacturers of equipment in order to prevent bid shopping and peddling.

Lastly, I would like to invite MAG's support for the WWEMA brief that was recently submitted to EPA. However, we do this in full recognition of the need to correct the problems suffered by other members of our industry referred to above, i.e., an effective program of pre-qualification, proper equipment scoping, and full understanding of supplier terms and conditions, all in a time frame that removes the hectic last-minute activities currently focused upon the contractor. It is believed that the regulations proposed in the brief will be effective, fair, and easy to administer. They will effectively control the practices of bid shopping and peddling in a manner that would be in the public interest and restore fairness to the wastewater treatment works construction industry.

In conclusion, we would like to point out that GSA has recently re-affirmed the principle of the listing requirement. We sincerely hope that WWEMA's concerns and recommendations will be given appropriate attention in EPA's report to the Congress.

Sincerely yours,

Frank P. Sebastian/ead

Frank P. Sebastian
President

Attachments

cc: Eugene J. Peltier
Members of MAG (w/o attachments)

John M. Scheer

BIDDING PROCEDURE

Submitted by MAG Subcommittee on Bidding

(Final Version)

1. PROBLEMS RESULTING FROM PRESENT PROCEDURE

Many problems result from the present procedure which includes overly zealous adherence to the principle of non-restrictive specifications as set forth in the language of Section 204(a)(6) of Public Law 92-500.

a. Protests and resultant delays from required investigative, justification efforts, and even litigation.

b. The general contractor's ability to submit a fully qualified bid without jeopardizing his own position is greatly reduced because of the last minute price submittals and adjustments by subcontractors and suppliers who are trying to protect their own positions. Late prices and adjustments are frequently made on equipment which is determined subsequently not to meet the specifications.

c. There is a failure to recognize basic differences between contractors and equipment manufacturers. Competent companies in the latter category usually have sustained substantial costs and efforts over a period of years in research and development, organizational support to owners and engineers in advance of the project, in effective bid preparation, in installation and operational check advisory services, and finally in creating adequate field staff for servicing and repairing their products. Contractors are particularly vulnerable to last minute price changes where there may be a failure to communicate such changes to all bidders.

d. The consulting engineer's contribution to the project is reduced because he is not permitted to exercise his professional judgment fully, including consideration of latent differences in equipment, and differences in operation and maintenance costs.

e. Extensive postbid shopping and peddling now occurs after the submittal of the general contractor's bid. This is not in the owners' interest, the public in most instances, because reduction in prices accrues to the advantage of the general contractor rather than of the owner. The owner loses the advantage of truly competitive bidding.

f. There have been suggestions that all equipment of all manufacturers desiring to submit bids be checked by the owner's engineer prior to the bid date. This suggestion is without merit as the cost to the owner and taxpayer cannot be justified. Much unsatisfactory equipment would necessarily have to be checked for compliance with the probable result that it would never be selected as the lowest and best bid item by the contractor. Because of design changes occurring almost constantly, no blanket approval

(Revised 10/8/197

EXCERPT OF TESTIMONY PRESENTED TO THE HOUSE COMMITTEE ON PUBLIC WORKS AND TRANSPORTATION

BY

WATER & WASTEWATER EQUIPMENT MANUFACTURERS ASSOCIATION, INC.

2) Non-Restrictive Specifications, Section 204(a)(6) of PL 92-500 - EPA interpretation of the current law, under Program Requirement Memorandum 75-5, is resulting in what WWEMA Members believe to be an unfavorable trend toward low bid equipment selection, and post-bid shopping by construction companies.

The unfavorable consequences of Section 204(a)(6) of the Clean Water Act include:

A) Reduction in the allowance for technical judgement permitted the municipal owner and consultant in selecting equipment that best meets their needs.

B) Low quality equipment resulting in substandard operating performance.

C) Discouragement of innovative technology.

D) A tendency to minimize consideration of operating costs, service life, reliability, and serviceability of equipment, unrelated to initial capital bid prices.

WWEMA recommends the elimination of Section 204(a)(6); or prequalification of eligible suppliers; or the Senate report on mandatory EPA re-evaluation. As an alternative to eliminating Section 204(a)(6) we suggest a new subparagraph (7) be added to read as follows:

> "(7) That solicitation for bids in connection with such works shall require the bidder to name the principle subcontractors (or its own firm when it will perform the work) and principle equipment suppliers. Grantees shall determine the catagories of work and equipment for which subcontractors' and suppliers' names are to be supplied."

ought to be given even to manufacturers who have an established reputation for excellent performance. Present procedure of checking the design and details of the apparent low bidder is the most cost-effective means of handling this item of work. The delay that would be occasioned by such preliminary review of all equipment is also not acceptable.

g. Bid bonds, considered in some quarters to be a remedy for non-responsive bidding, are unacceptable as protection for the owner's interest. Attempts to collect on bid bonds nearly always result in litigation, with delays and additional expense due to legal costs and inflation.

2. GENERAL SOLUTIONS

a. A greater demonstration of integrity and responsibility by all parties is essential.

b. Allow the engineer more latitude in meeting the obvious intent of Section 204(a)(6) concerning non-restrictive specifications and to utilize his expertise and judgment in determining the total cost of equipment bids and his knowledge of a manufacturer's experience and past performance in his overall evaluation.

c. Eliminate postbid shopping and peddling.

d. Encourage ethical bidding procedures and discourage revelation of sub-bids by the contractor as a means of improving his position.

e. Allow owner and engineer some leeway in determining the lowest and best bid even to the point of allowing payment of a premium, say 1-5%, when there are latent differences in equipment design, serviceability, delivery, or other substantial reasons.

3. SPECIFIC RECOMMENDATIONS

a. Allow the grantee, at his discretion, to require general contractor to include in his bid the identification of all major subcontracts and major equipment suppliers. Restrict all deviations or changes except where they are shown to be, without question, in the owner's or public's interest.

b. In order to provide entry into the market by new equipment manufacturers, permit the contractor to name any major manufacturer's equipment as a deductible alternative if he first designates an approved or named item of equipment as his base bid. Determination of the low bid shall be based on the base bid.

MEMORANDUM

Anti-Bid Peddling and Shopping

Guidelines/Regulations

Following are some suggestions regarding bid peddling and shopping appropriate for discussion with EPA, AGC, ACEC and WWEMA Joint Committee.

AMENDMENT OF EPA GUIDELINES/REGULATIONS

The EPA Regulations, at 40 CRF 35,936-3, now read as follows:

Competition

> It is the policy of the Environmental Protection Agency to encourage free and open competition appropriate to the type of project work to be performed.

In view of the bid peddling and shopping problem, the above regulation might be amended by adding the following:

> Because the practices of bid peddling and shopping in connection with the construction grants deprive the public of the full benefits of fair and orderly competition among prime contractors, subcontractors and suppliers, grantees should prohibit such practices where appropriate.

The above addition is merely a general statement in accordance with a California statute and with similar provisions in the American Institute of Architects "Handbook of Architectural Practice," and in the "Code of Ethics" of the Associated General Contractors of America. (The Water and Wastewater Equipment Manufacturers Association has no document of Terms and Conditions.) Bid peddling and shopping have long been recognized as unethical by those construction trade organizations.

The term "orderly" in the suggested provision especially relates to the interests of prime contractors. One difficulty arising out of bid peddling and shopping is that when subcontractors anticipate that bid peddling and shopping will occur on a project, sub-bids are held until the last possible moment and thus make it impossible for general contractors to obtain bids far enough in advance to have sufficient time to properly prepare their own bids. If prohibitions against bid peddling and shopping are combined with pre-qualification procedures, prime contractors should be in a position to prepare their bids in an orderly fashion.

Prevention of bid peddling and shopping is also clearly advantageous to the EPA whose interest is to complete as many sewage treatment projects as possible with limited funds. Should bid peddling and shopping become common on EPA-funded projects (as appears to be the trend), subcontractors will pad their initial bids in order to make further reductions during post-award negotiations. This artificial inflation of subcontractors' offers make the bidding process less effective and can cause increased costs to the EPA. Further, any price reductions obtained through the use of post-award bid peddling and shopping are of no benefit to the EPA, to whom these price reductions would normally accrue as a result of open competition before the award of the prime contract. As stated by the Court in Ring Construction:

> "The party who invariably loses in a post-award bid shopping situation is the awarding authority. When bid shopping is used by the general (contractor) after the award of the prime contract, the awarding authority is faced with the possibility of poor workmanship, because subcontractors who are forced to reduce their price may rely on inferior quality methods and materials in order to reap some profit."

Bid peddling and shopping is also contrary to the goals of the EPA in a less obvious, but longer term, respect. This is so because oneway equipment suppliers may attempt to maintain profitability in markets where bid peddling and shopping is prevalent is to restrict their efforts in product improvement and development and concentrate on reductions in product cost. Such stifling of innovations is detrimental to the long-term interests of the public. Also the practice creates an unfair and competitive situation for manufacturers providing technological developments and information during the design stage.

SPECIFICATION PROVISIONS PROHIBITING BID PEDDLING AND SHOPPING

The above suggested regulation and the existing Codes of Ethics are not self-executing.

> It would be most helpful to the industry to have approval by the EPA, say, via a Program Requirements Memorandum, of a uniform provision which can be used by grantees, when writing specifications for projects to be funded by EPA grants, to prohibit bid shopping and peddling. Absent such a uniform provision, there may be disputes regarding a grantee's intent on a particular project. The uncertainty of the present situation is aggravated by the fact that laws in many states are unclear and are in conflict with federal case law.

For example, state laws are often unclear as to the effect of a failure to name subcontractors and suppliers where a specification calls for a listing of the names of those parties. Further, there are conflicts between state and federal law as to whether a failure to list subcontractors and suppliers is a matter of responsibility or responsiveness. Still further, state and local law is sometimes insufficient to prevent bid shopping even where subcontractors and suppliers have been named by a prime contractor in his bid proposal. A uniform EPA policy in this area could do much to preclude disputes, protests and litigation.

LISTING OF MANUFACTURERS OF EQUIPMENT

Each bidder shall enter in the spaces provided below the names of the manufacturers of equipment which he proposes to furnish. This requirement is to prevent bid shopping and peddling; failure to list a manufacturer, or the listing of more than one manufacturer, for any one of the items of equipment listed below shall render a bid nonresponsive. Upon award of a contract, the owner shall direct that the named equipment shall be furnished. Substitutions will be permitted only if the named equipment does not meet the specifications or the manufacturer is unable to meet delivery requirements of the construction schedule.

Preliminary acceptance of equipment listed by manufacturer's name shall not in any way constitute a waiver of the specifications covering such equipment; final acceptance will be based on full conformity with the specifications covering the equipment.

Failure to furnish all information requested below shall be cause for rejection of the bid.

List of Principal Equipment	Manufacturer

24 JAN 1978 COB.
info Mr. Cahill

COUNTY SANITATION DISTRICTS
OF LOS ANGELES COUNTY

1955 Workman Mill Road / Whittier, California
Mailing Address: / P. O. Box 4998, Whittier, California 90607
Telephone: (213) 699-7411 / From Los Angeles (213) 685-5217

JOHN D. PARKHURS
Chief Engineer and General Manage

January 15, 1978

Mr. Harold P. Cahill, Jr.
Director, Municipal Construction
Division
United States Environmental
Protection Agency
401 M. Street, S.W.
Washington, D.C. 20460

Dear Hal:

I asked Mr. Vince DePalma, our Assistant Office Engineer, to review WWEMA's proposed regulations on Bid Shopping and Peddling. His summary comment is that efforts in this regard would best be left to local agencies to include where appropriate, but it is not advisable to invoke a generalized EPA regulation.

Mr. DePalma's detailed comments are attached. I hope they prove of value in your deliberations.

Very truly yours,

Chuck

Charles W. Carry

CWC:ld
cc: Eugene J. Peltier

JAN 23 1978

WH-547

PROPOSED REGULATION ON BID SHOPPING AND PEDDLING

This is to comment on the subject proposed regulation as recommended by WWEMA.

It may be appropriate to review the Districts' policy and experience in this area. Over the past 2½ years the Districts have awarded 23 construction projects under the Clean Water Grant Program totalling $80 million. On construction contracts where large items of equipment are critical to the design and performance of the project, the District often purchases such equipment directly from the manufacturer. This procedure obviously eliminates all bid peddling or shopping. Suppliers of certain other items of equipment on construction projects are required to be listed on the bid proposal form by the contractor. The equipment to be listed is selected by the Districts' Engineering staff based on its cost and on the basis of its relative importance to the project. No fixed percentage of project cost is used as a guideline for inclusion of equipment in this list. The list is generally brief, ranging from 2 or 3 items on a small project, to about a dozen items on a large project. An attempt is made to keep the list brief in the interest of avoiding mistakes as a result of last-minute changes in suppliers at bid time. To the best of our knowledge, this list has enabled the contractors to obtain the lowest prices prior to submitting his bid and has prevented bid peddling and bid shopping.

The Districts are required by State Law to have the contractor list on his bid proposal form, all subcontractors who will perform work which has a value in excess of ½ of 1 percent of the project cost. A subcontractor is defined as a contractor who contracts directly with the prime contractor and who supplies material or labor at the project site. In California the statutory requirements for substitution of subcontractors closely parallel the requirements set forth in the proposed regulation.

We do not feel the need for any additional regulations in the area of listing of subcontractors or equipment suppliers and, in fact, believe that such a regulation could be, at times, counter-productive. Some of the reasons for this are as follows:

1. Such a regulation would cause the bid form to be very lengthy. In the pre-bid rush to complete the form properly, while receiving last-minute sub-bids, the contractor would be exposed to a very high risk of a costly error.

2. A mistake or omission on the form would result in the bid being declared non-responsive. Should a low bid be declared non-responsive, the agency can either award to the 2nd low bidder, assuming his bid is in order, or reject all bids and readvertise. The former alternative certainly results in higher costs, the

latter often has the same result, not to mention increased administrative costs.

3. The proposed regulation closely parallels California Statute regarding listing of subcontractors (not including material and equipment suppliers); however, there are significant differences in the area of substitution of subcontractors. This would make such a substitution by a California agency confusing, at best.

4. The proposed penalty for substitution without approval, even if legal, would force the prime contractor on most construction contracts deeply into the red and cause him to either finish the contract while trying to minimize his losses or to default. Neither alternative is especially appealing for most agencies.

5. The regulation could be circumvented in the area of material and equipment suppliers by the contractor intentionally listing material or equipment which does not meet specifications. When his bid is accepted and he is informed that he must supply specified material or equipment, he is free to shop.

In summary, it is our recommendation that control of bid shopping and peddling be left to the local agencies.

BARGE, WAGGONER, SUMNER AND CANNON ENGINEERS AND PLANNERS

THIRTEENTH FLOOR · PARKWAY TOWERS
404 JAMES ROBERTSON PARKWAY
NASHVILLE, TENNESSEE 37219 · (615) 254-1501

DAN BARGE, JR.
WILLIAM L. WAGGONER
BILLY T. SUMNER
WILLIAM H. CANNON

KENNETH N. HAYS
THOMAS P. LEE
JAMES H. MOTLIES
DIFON L. NORTHCUTT, AIP
WM. HUNTER OWEN
RICHARD G. PATTON
JAMES T. REYNOLDS
JAMES A. WILBUR
THOMAS WEODRAND AIA
JOHN H. WRIGHT

January 16, 1978

Mr. Harold P. Cahill, Jr.
Director, Municipal Construction Division
Environmental Protection Agency
401 M Street, S.W.
Washington, D.C. 20460

Re: WWEMA Position on Bidding

Dear Hal:

Generally, I sympathize with the problem being addressed. As with most regulatory activity, it is difficult not to over-kill. The correction of a perceived ill frequently creates a cross-fire hazardous to many that are innocent of any wrongdoing. My specific comments are confined to the points that I deem more critical in Appendix I - Proposed Regulations.

(a) Is this factual? Has EPA actually reached such conclusions?

(b) There is ambiguity in the use of the word "supplier." Could it include manufacturers' representatives, jobbers, distributors, or dealers, for instance?

(c) Specifications cannot always be written to completely segregate and categorize each and every type of work that might be subcontracted. It would be risky to start breaking down the contract documents into portions that apply vis-a-vis those that do not apply to a given operation. A threshold of three percent is too low. The bid form would be ridiculously long.

(d)(F)(1) What is meant by "subcontractor's bid?" Who says he has to bid? Suppose the prime has terms and conditions other than those prepared by the engineer?

(d)(E)(4) An illegal sub should not be proposed by a prime.

(d)(F) This is unnecessary if a sub is guilty of any of the patently irresponsible conditions under (E).

(d)(F)(2) How does the Owner get a relationship with a sub that warrants direct communication?

JAN 20 1978
W-11547

(d)(G) How does the subcontract "price" get into the picture? This is between the prime and his sub. Is a pre-set penalty without reference to actual damage legal?

(d)(H) What does this mean? How is "price" determined if not shown on the bid form?

In summary I would say:

1. WWEMA's approach sounds good on the surface but would prove unworkable in practice.
2. Most engineers would need counsel of general contractors to completely categorize all work.
3. Pre-approval of equipment may be needed to protect prime.
4. I am in favor of something, but I don't know exactly what.

Sorry, Hal, about this lousy response, but it's the best I can do for now.

Yours very truly,

Billy

Billy T. Sumner

cc: MAG Members

CITY OF LOS ANGELES
CALIFORNIA

BOARD OF PUBLIC WORKS
MEMBERS
WARREN A. HOLLIER
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VICE PRESIDENT
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MAYOR

DEPARTMENT O
PUBLIC WORK
BUREAU OF
ENGINEERIN
DONALD C. TILL
CITY ENGINEER
ROOM 800, CITY
LOS ANGELES 9

DATE JAN 17 1978

Mr. Harold P. Cahill, Jr., Director
Municipal Construction Division
United States Environmental
Protection Agency
Washington, D. C. 20460

Dear Hal:

Your memo of January 4, 1978 requested comments from MAG members concerning bidding problems associated with the construction grants program.

There is one item that has caused considerable unnecessary work and confusion. This is the requirement to comply with the statutory time limits of the Davis-Bacon Act.

The Davis-Bacon Act requires that the latest prevailing wage determination be used for all bids. We have no objection to this requirement, however, the Act further stipulates that the latest wage determination published 10 days prior to bid opening shall be included in all bids.

It is almost an impossibility to comply with the 10-day limitation for the following reasons:

1. The wage rates are published on a random basis.
2. The receipt of the Federal Register is not always prompt.

I, therefore, would recommend that legislation be enacted to amend the Davis-Bacon Act to either:

1. Require the publication on a regular basis (i.e., quarterly or the first day of alternate months) either the new rates or a notice that no changes have been made since the date of the previous notice.

JAN 23 1978

W-H547

JAN 17 1978

2. Change the 10-day requirement to 30 days. This would allow sufficient time to notify all of the prospective bidders.

I would recommend alternative number one as it would be easier to ascertain the latest prevailing wage rates.

Sincerely,

Donald C Tillman

DONALD C. TILLMAN
City Engineer

DCT/RSH:kem
cc: Eugene Peltier

METROPOLITAN
SEWERAGE
DISTRICT

OF THE COUNTY OF MILWAUKEE
P.O. BOX 2079 MILWAUKEE, WISCONSIN 53201
PHONE 271-2403

Sewerage Commission of the City of Milwaukee · Metropolitan Sewerage Commission of the County of Milwaukee

January 20, 1978

Mr. Harold P. Cahill Jr.
Director of
Municipal Construction Division
U.S. Environmental Protection Agency
401 M Street, S. W.
Washington, D.C 20460

Subject: Building Procedures
Construction Contracting in the Construction
Grants Program

Dear Mr. Cahill:

We have reviewed the proposal sent us by Water and Wastewater Manufacturers Equipment Association Inc. regarding the subject bidding problems. The proposed procedure has the potential to decrease the frequency and magnitude of the incidents. Several of us have utilized a similar system wherein the prime bidders were requested to render a breakdown of their quotations on a sheet which was a part of the bid documents. Coincident with this, they also had to list and indicate each subcontractor and his involvement in the work to be performed. This method did not negate all problems but certainly kept them to a controllable minimum.

There are several other methods which have been used more frequently in the private sector in securing bids and managing construction which eliminates the bid shopping and allows the owner the opportunity of obtaining the best price and job. Some of these have not been totally acceptable on projects which are EPA grant funded.

A method wherein a prime contractor is not secured and bid packages are bid independent of one another, resulting in a group of contractors working directly for the owner is one way to achieve control. Also in conjunction with this, the owner acquires the major components. This places

1974 Amer. Soc. of Civil Engrs. Landmark Award · 1974 Amer. Soc. of Civil Engrs. Wisconsin Engr. Achievement

more responsibility on a management team but tends to maximize control and has the potential to reduce overall project costs and the total time frame from concept to completion. This method has developed over the last decade, gaining acceptance primarily in the private sector and on a few EPA grant funded projects. The management system has been identified by several terms, one of which is generally referred to as Construction Management. Due to the numbers of people on the owners staff and other routine commitments, the Construction Management team is usually composed of personnel contracted by the owner to function on his behalf. This is one of the basic approaches to be considered for each project in the Milwaukee Pollution Abatement Program during the project delivery analyses.

This method varies from the traditional approaches. Current regulations need to be reconsidered with possible revisions to allow for a fuller use of the Construction Management system, where applicable on a project. Since the end result is to achieve clean water as quickly and economically as we can, changes in the bidding systems and procurement procedures should be considered and executed.

Please contact me if we can be of further assistance in this matter.

Sincerely yours,

Dr. William J. Katz
Director of Technical Services

United States Department of the Interior

BUREAU OF MINES
2401 E STREET, NW.
WASHINGTON, D.C. 20241

IN REPLY REFER TO:

February 27, 1978

Mr. James R. Murphy (WH-547)
U. S. Environmental Protection Agency
401 M Street, S.W.
Washington, D.C. 20460

Dear Mr. Murphy:

Some time ago Jim Ewing requested my comments on the practice of bid shopping, etc. I have completed the enclosed questionnaire which Jim sent to me. I hope it will help in your survey.

Sincerely yours,

J. A. Herickes

J. A. Herickes, Deputy Chief
Division of Procurement

Enclosure

SPECIFICATION & BIDDING PROCEDURES

QUESTION / ISSUE	SHOULD IT BE PERMITTED	SHOULD IT BE REQUIRED	IS IT ENCOURAGED OR DISCOURAGED	DOES IT OR WOULD IT REDUCE PROJECT DELAYS	BY WHAT PERCENT	DOES IT OR WOULD IT INCREASE PROJECT DELAYS	BY WHAT PERCENT	REMARKS
BID SHOPPING (POST CONTRACT AWARD)	☒	☒	Discouraged	No.	—	Sometimes But not always	—	
PREQUALIFICATION OF MAJOR EQUIPMENT (PRE BID ADVERTIZEMENT)	Yes	No	Neither	–	–	–	–	
REQUIREMENT TO NAME MAJOR SUBS & EQPMT. SUPPLIERS IN BID SUBMISSION (ONE ONLY PER EACH ITEM)	Yes	Yes	Encouraged	Yes	5-10%	No	—	
OTHER (SPECIFY IF POSSIBLE)								
RECOMMENDED CHANGES TO								
LEGISLATION	None							
EPA REGULATIONS	None							
EPA GUIDANCE (PRM 75-5)	Seems unfair to the grantee. If grantee selects higher cost item, he should be liable only for difference in cost of A over B, not total cost of A.							
OTHER								

NCPI

NATIONAL CLAY PIPE INSTITUTE

Washington Office

Tel. (202) 296-5270

March 1, 1978

Mr. Douglas M. Costle, Administrator
Enviromental Protection Agency
401 M. Street, S.W.
Washington, D.C. 20460

Dear Mr. Costle:

The National Clay Pipe Institute is composed of nearly all of the U.S. manufacturers of Vitrified Clay Pipe (VCP). Our product is widely specified and has been installed on many EPA funded projects since the beginning of the federal water pollution control program. Our members are well experienced in processing bids under the limitations of the non- restrictive specifications paragraph, Section 204 (a) (6) of PL 92-500 (FWPCA, 1972).

We believe that the cited paragraph has caused unnecessary complexities and needless delays in processing contracts under the construction grants program. It is for this reason that we offer our comments and recommendation to assist the Administrator in compiling his report to the Congress pursuant to the "Water Treatment Contracting and Bid Shopping" provision in the Conference Report accompanying H.R. 3199, 95th Congress (H. Rept. No. 95-830).

The comments and recommendation are designed to apply to materials procurement only. They do not include any reference to the bid shopping phase of this problem in as much as this practice is rarely encountered in our experience in pipe material procurement.

We would appreciate receiving, prior to the submission of your report to the Congress, a response to these comments and recommendation when you have formulated a position thereon.

Sincerely,

A.J. Reed

A. J. Reed
President

Enclosure

THE NON-RESTRICTIVE SPECIFICATIONS PARAGRAPH: COMMENTS AND RECOMMENDATION

Although the legislative history concerning the non-restrictive specifications paragraph furnishes no guide to the purpose of the Congress in adopting it, its function is clear. It is to insure the type of free and open competition which is required on all federal and federally assisted construction projects. Nevertheless, other construction grant programs administered by the Economic Development Administration (EDA) and the Farmers Home Administration (FmHA) are not burdened, as is the EPA program, with the detail of administration of this or similar sections.

Consequently, these other agencies are free to pursue the objectives of their programs under the clear guidance of Attachment O, OMB Circular No. A-102 , Procurement Standards. A pertinent section of that directive is quoted.

> "Grantees may use their own procurement regulations which reflect applicable State and local laws, rules and regulations provided that procurements made with Federal grant funds adhere to the standards set forth as follows..... (c) (2) Invitations for bids or requests for proposals shall be based upon a clear and accurate description of the technical requirements for the material, product, or service to be procured. Such description shall not, in competitive procurements, contain features which unduly restrict competition. 'Brand name or equal' description may be used as a means to define the performance or other salient requirements of a procurement, and when so used the specific features of the named brand which must be met by offerors should be clearly specified."

On the other hand, the cumulative effect of the direct obligation laid on the Administrator, EPA by Section 204 (a) (6) (the Section), coupled with the protest procedures established by EPA to insure fairness in its implemtation, has been negative. The results have been: encouragement of protests additional delays and the repeated insertion of the Administrator into the procurement process at the municipal level. To what end? Are the waters cleaner for this? Is competition on EPA projects so much keener than on FmHa projects?

It is our contention that there is simply no need for this provision in the statute authorizing the EPA construction grant program. However, we recognize that there may be practical difficulties in the way of its deletion. We recommend, therefore, that the Section be modified to apply the general rule of procurement under federal grants. This is to authorize the application of State or local law, so long as such law effectively provides the same fundamental protections as the federal law. The States and municipal corporations have, over many years, developed a strong body of statutory and case law to provide these safeguards. Thus,

> "The purpose of the provisions so generally found in constitutions, statutes, city charters and ordinances reguiring that contracts with public authorities (exceeding a certain stipulated amount) be let only after competitive bidding are to secure economy in the construction of public works and the expense of public funds for materials and supplies needed by public bodies... and to promote actual, honest and effective competition...".
> 64 Am. Jur. 2d Public Works and Contracts, § 37, p. 889.

The OMB Circular acknowledges the widespread existence of these local controls by authorizing their application to federal grants, while insisting on certain standards, including, as noted above, the self-same limitations on "brand name (s) or equal," as are imbedded in the Section. We are unaware of any substantial difficulties suffered by EDA or FmHA in operating their construction programs under the OMB Circular. We believe that EPA can achieve the same degree of release from administrative detail as is enjoyed by these other agencies by modifying the Section to permit the application of the OMB principles.

A large body of what may be termed "protest law" has arisen and will increase inexorably in EPA so long as the Section is left undisturbed and so long as there are disappointed contractors and potential suppliers prepared to trod the quick and easy path to the EPA protest arena. We do ont believe that it is in EPA's best interest to allow this situation to continue.

The procedure we are recommending would be wholly consistent with the delegation section of 40 CFR 35.936-21 (1977) now contained in the EPA Regulations. The States have shown little disposition to utilize this section. We believe that its transfer into the statute will increase its visibility and raise the level of State participation in this method of procurement.

Moreover, the adoption of this approach is harmonious with EPA's continuing effort to delegate to the States its control over administrative details, where-ever practicable. Futhermore, the unending EPA search for means to implement Section 101(f) of FWPCA, 1972 would be promptly rewarded, while simultaneously encouraging others to join in the universally-expressed desire to minimize paperwork.

RECOMMENDATION

That Section 204 (a) (6) of FWPCA, 1972 be amended by adding a proviso paragraph, the purpose of which would be to grant to the Administrator the authority to approve, on request, the application of State or local procurement law to EPA grants, if the Administrator is satisfied that such procurement meets the standards of the Section and OMB Circular A-102.

Draft legislative language to implement the above recommendation is attached as Exhibit A.

SUGGESTED LEGISLATIVE CHANGE TO
SECTION 204 (a) (6), FWPCA, 1972

ADD THE FOLLOWING:

"provided, however, that a State agency which has been or may be delegated authority by the Administrator to review plans and specifications under Section 203 (a) and which considers that the State laws which govern municipal procurement operate substantially to provide the same protections as provided by the limitations of this paragraph may request the Administrator to approve, and the Administrator, if he agrees, shall approve the State system of procurement as used by municipalities in such State."

EXHIBIT A

AMSA

ASSOCIATION OF METROPOLITAN SEWERAGE AGENCIES
SUITE 200, 1015 18th ST., N.W., WASHINGTON, D. C. 20036 (202) 659-9161

MEMBER AGENCIES
(March, 1974)
Greater Anchorage Area Borough, AK
City of Phoenix, AZ
City of Tucson, AZ
City of Los Angeles, CA
County Sanitation Districts of Los Angeles County, CA
East Bay Municipal Utility District Oakland, CA
County Sanitation Districts of Orange County, CA
City of Sacramento, CA
County of Sacramento, CA
City of San Diego, CA
City and County of San Francisco, CA
City of San Jose, CA
Metropolitan Denver Sewage Disposal District No. 1, CO
The Metropolitan District (Hartford County), CT
Miami-Dade Water and Sewer Authority, FL
City of Atlanta, GA
City and County of Honolulu, HI
Metropolitan Sanitary District of Greater Chicago, IL
City of Indianapolis, IN
City of Wichita, KS
Louisville and Jefferson County Metropolitan Sewer District, KY
City of Baltimore, MD
Washington (D.C.) Suburban Sanitary Commission, MD
Metropolitan District Commission (Boston), MA
Detroit Metro Water Dept., MI
County of Wayne, MI
Metropolitan Sewer Board (Minneapolis-St. Paul), MN
City of Kansas City, MO
Metropolitan St. Louis Sewer District, MO
City of Omaha, NE
Bergen County Sewer Authority, NJ
Middlesex County Sewerage Authority, NJ
Passaic Valley Sewerage Commissioners, NJ
City of New York, NY
City of Greensboro, NC
Metropolitan Sewer District of Greater Cincinnati, OH
Cleveland Regional Sewer District, OH
City of Columbus, OH
City of Dayton, OH
City of Portland, OR
Allegheny County Sanitary Authority, PA
City of Philadelphia, PA
City of Providence, RI
City of Memphis, TN
Metropolitan Government of Nashville and Davidson County, TN
City of Dallas, TX
City of Fort Worth, TX
City of Houston, TX
Hampton Roads Sanitation District, VA
Municipality of Metropolitan Seattle, WA
City of Charleston, WV
Metropolitan Sewer District of the County of Milwaukee, WI

March 3, 1978

Mr. James R. Murphy
United States Environmental
Protection Agency
401 M Street, S. W.
Washington, D.C. 20460

Dear Mr. Murphy:

Enclosed is a hasty preparation of your questionnaire attached to your letter which reached us on February 24. Rather than take the time to submit it to our appropriate committees, we have made some assessments and filled it in as best as possible.

Hope it is of assistance.

Sincerely,

Ron Linton

Ron M. Linton

SPECIFICATION & BIDDING PROCEDURES

QUESTION / ISSUE	SHOULD IT BE PERMITTED	SHOULD IT BE REQUIRED	IS IT ENCOURAGED OR DISCOURAGED	DOES IT OR WOULD IT REDUCE PROJECT DELAYS	BY WHAT PERCENT	DOES IT OR WOULD IT INCREASE PROJECT DELAYS	BY WHAT PERCENT	REMARKS
BID SHOPPING (POST CONTRACT AWARD)	☒	☒	DISCOURAGED					NO MEMBER FAVORS OR AIDS BID SHOPPING
PREQUALIFICATION OF MAJOR EQUIPMENT (PRE BID ADVERTIZEMENT)	YES	NO	NO SET TREND	DOESN'T AFFECT	UNKNOWN	CAN RESULT IN LAW SUITS	UNKNOWN	IN SOME PLACES PREQUAL CAN RESULT IN PRICE FIXING TECHNICALLY MANY MEMBERS PREFER BUT INCREASES POTENTIAL OF NON RESPONSIVENESS
REQUIREMENT TO NAME MAJOR SUBS & EQPMT. SUPPLIERS IN BID SUBMISSION (ONE ONLY PER EACH ITEM)	YES	NO	NO SET TREND	"	"	DOESN'T AFFECT	"	CAN PROVIDE BETTER QUALITY CONTROL BUT CAN RESULT IN BID CHALLENGES
OTHER (SPECIFY IF POSSIBLE)								

RECOMMENDED CHANGES TO	
LEGISLATION	
EPA REGULATIONS	allow for specifying three or four models or types of equipment and eliminate the "or equal" terminology
EPA GUIDANCE (PRM 75-5)	
OTHER	

Bood + mai
FYI

14 MAR 1978
COB
Vmu 3/16

MOON LANDRIEU, President
HARRY McCALL, JR., President Pro-Tem.

Sewerage & Water Board OF NEW ORLEANS

CITY HALL · CIVIC CENTER
NEW ORLEANS, LA., 70165 · 586-4588

STUART H. BREHM, JR.
Executive Director

March 9, 1978

Mr. James R. Murphy
401 "M" Street
Southwest Washington, DC 20460

Dear Mr. Murphy:

At the request of Mr. Richard Sullivan, of the American Public Works Association, I am attaching a copy of the survey form that was submitted to us concerning specification and bidding procedures.

Should you need further information please do not hestitate to contact me.

Yours very truly,

Stuart H. Brehm, Jr.
Executive Director

SHBjr/dmp

Attachment

ccs: Mr. Joseph Sullivan
Mr. Richard Sullivan

SPECIFICATION & BIDDING PROCEDURES

QUESTION / ISSUE	SHOULD IT BE PERMITTED	SHOULD IT BE REQUIRED	IS IT ENCOURAGED OR DISCOURAGED	DOES IT OR WOULD IT REDUCE PROJECT DELAYS	BY WHAT PERCENT	DOES IT OR WOULD IT INCREASE PROJECT DELAYS	BY WHAT PERCENT	REMAR
ID SHOPPING ST CONTRACT AWARD)	☒	☒						Should not be permitted.
EQUALIFICATION MAJOR EQUIPMENT E BID ADVERTIZEMENT)			Is encouraged					Reduces bid evaluation time.
QUIREMENT TO NAME JOR SUBS & EQPMT. PLIERS IN BID SUBMISSION E ONLY FOR EACH ITEM)			Encouraged					Assists in bid evaluation.
OTHER ECIFY IF POSSIBLE)								None
COMMENDED CHANGES TO	New Orleans is governed by the State of Louisiana Department of Health and any recommended changes should come through that Department.							
LEGISLATION								
PA REGULATIONS		None						
A GUIDANCE PRM 75-5)		None						
OTHER		None						

DEPARTMENT OF THE ARMY
OFFICE OF THE CHIEF OF ENGINEERS
WASHINGTON, D.C. 20314

28 MAR 1978
Ccu

REPLY TO
ATTENTION OF:

DAEN-CCZ-M

21 March 1978

Mr. James R. Murphy
401 M Street, S. W.
Washington, D. C. 20460 (WH-547)

Dear Mr. Murphy:

Inclosed, pursuant to the recent request of Mr. Cahill, are the replies of the Corps of Engineers to your questionnaire.

I trust this information will be of assistance to you in your study of these problems.

Sincerely yours,

J Lankhorst

J. LANKHORST
Acting Chief Counsel

1 Incl
as

SPECIFICATION & BIDDING PROCEDURES

QUESTION / ISSUE	SHOULD IT BE PERMITTED	SHOULD IT BE REQUIRED	IS IT ENCOURAGED OR DISCOURAGED	DOES IT OR WOULD IT REDUCE PROJECT DELAYS	BY WHAT PERCENT	DOES IT OR WOULD IT INCREASE PROJECT DELAYS	BY WHAT PERCENT	REMARKS
BID SHOPPING (POST CONTRACT AWARD)			Neither	NO		NO		NONE
PREQUALIFICATION OF MAJOR EQUIPMENT (PRE BID ADVERTIZEMENT)	NO	NO	Discouraged	NO		Probably	*Unknown	*Corps of Engineers does not do this therefore, there is no experience data on which to base an estimate
REQUIREMENT TO NAME MAJOR SUBS & EQPMT. SUPPLIERS IN BID SUBMISSION (ONE ONLY FOR EACH ITEM)	* NO	NO	Discouraged	NO		Probably	**Unknown	*Over the years, the DOD has opposed legislation requiring such bid listing in Federal contracts. **Corps of Engrs. has never used this procedure. Therefore, there is no experience data on which to base an estimate.
OTHER (SPECIFY IF POSSIBLE)								
RECOMMENDED CHANGES TO								
LEGISLATION								
EPA REGULATIONS								
EPA GUIDANCE (PRM 75-5)								
OTHER								

Brodtman
FYI

FRANCIS T. PURCELL
COUNTY EXECUTIVE

MICHAEL R. PENDER, P.E.
COMMISSIONER

COUNTY OF NASSAU
DEPARTMENT OF PUBLIC WORKS
MINEOLA, NEW YORK 11501

13 APR 1978
coc

March 31, 1978

U.S. Environmental Protection Agency
401 "M" Street, S.W.
Washington, D.C. 20460

ATT: Mr. James R. Murphy

RE: Study on Bid Shopping Practices

Gentlemen:

The American Public Works Association forwarded a copy of your letter to them on the EPA study on bid shopping practices. Mr. Richard H. Sullivan, of APWA, requested my Department's views on the subject.

We have reviewed the relevant information, and are returning herewith the filled-in "Specification & Bidding Procedures" questionnaire.

Very truly yours,

Michael R. Pender, P.E.
Commissioner

MRP:FVR:rs
Enc.
cc-w/Enc.:
R. Sullivan
J. Gillen
F. Merklin
F. Flood

N.C. DPW
March 1978

SPECIFICATION & BIDDING PROCEDURES

QUESTION / ISSUE	SHOULD IT BE PERMITTED	SHOULD IT BE REQUIRED	IS IT ENCOURAGED OR DISCOURAGED	DOES IT OR WOULD IT REDUCE PROJECT DELAYS	BY WHAT PERCENT	DOES IT OR WOULD IT INCREASE PROJECT DELAYS	BY WHAT PERCENT	REMAR
ID SHOPPING (…ST CONTRACT AWARD)	X	X	Neither	Possibly Yes *	--	No *	--	Would tend to increase project costs.*
…EQUALIFICATION … MAJOR EQUIPMENT … E BID ADVERTIZEMENT)	Yes	Each situation would have to be analyzed.	Encouraged	Yes	--	No	--	
…QUIREMENT TO NAME …JOR SUBS & EQPMT. …PLIERS IN BID SUBMISSION … & ONLY ONE EACH ITEM)	No	No	Discouraged	Possibly	--	No	--	Would tend to increase project costs.
OTHER (…PECIFY IF POSSIBLE)	Specify three manufacturers in bid document. Allow successful bidder to propose "Or Equal" substitutions for a limited time period after award of contract. (This does not apply to subs and suppliers.)							
…COMMENDED CHANGES TO								
LEGISLATION	Necessary to implement above. In particular, the recognition of time limitations cited above.							
…PA REGULATIONS	Same comments as "Legislation" above.							
…A GUIDANCE (…PRM 75-5)	Same comments as "Legislation" above.							
OTHER								

*if bid shopping is eliminated

american
concrete
pipe
association

December 14, 1977

Mr. Douglas M. Costle, Administrator
U. S. Environmental Protection Agency
401 M Street, S. W., Room 1200
Washington, D. C. 20460

Dear Mr. Costle:

In the last section of the EPA Conference Report, House Report No. 95-830, there is a provision instructing the Administrator of the Environmental Protection Agency, within three months, to review the bid and award policy for equipment as originally outlined in Section 204 (a) (6) of Public Law 92-500.

This section of the 1972 law deals with EPA's policy on the bid and award procedure for waste treatment equipment, but, when this was implemented into the regulations as paragraph 35.935-26 "Nonrestrictive Specifications" the section dealt with the bid and award policy for not only equipment but for pipe and materials. Of particular interest to the concrete pipe industry is the last sentence of that paragraph which states: "With regard to materials, if a single material is specified, the grantee must be prepared to substantiate the basis for the selection of the materials."

Our industry strongly supports this bid and award policy for pipe and materials, and I wanted to bring this to your attention to define the two issues, so that your response to the Congress will not affect our coverage in the regulations but deal only with the problem identified with regard to equipment.

Thank you very much for your consideration of these comments, and my very best personal wishes for the Holiday Season.

Sincerely,

Richard E. Barnes
President

REB:rs
cc: Government Relations Committee

8320 old courthouse road • vienna virginia 22180 • (703) 821-1990

american
Concrete
Pipe
association

January 27, 1978

Mr. Walter Brodtman
U.S. Environmental Protection Agency (WH-547)
401 M. Street, S.W., Rm. 1219A
Washington, D.C. 20460

Dear Mr. Brodtman:

At the MAG meeting on January 23, we learned that you have the lead responsibility for the bid shopping provision in P.L. 95-217, and developing recommendations for Congress. As imput on this issue, we are attaching our letter to Doug Costle of December 14, 1977. We would appreciate your consideration of the points made in the attached letter as an official position of our industry. If questions arise, please call me. We would also appreciate reviewing your draft on this issue.

Very truly yours,

Cyril I. Malloy
Vice President Government Relations

CIM:ll
Enclosure

8320 old courthouse road • vienna virginia 22180 • (703) 821-1990

STATE of INDIANA

STATE BOARD OF HEALTH
An Equal Opportunity Employer

1816

INDIANAPOLIS

Address Reply to:
Indiana State Board of Health
1330 West Michigan Street
Indianapolis, IN 46206

March 20, 1978

27 MAR 1978
coc

Mr. James R. Murphy
401 "M" Street, S.W.
Washington, D. C. 20460 (WH-547)

Dear Mr. Murphy:

Re: Bid Shopping Questionnaire

As requested by Mr. R. H. Sullivan's memorandum dated March 6, 1978, I am forwarding the questionnaire pertaining to Bid Shopping practices.

Very truly yours,

Ralph C. Pickard

Ralph C. Pickard
Assistant Commissioner
for Environmental Health

EABohner/jm

Enclosure

cc: Mr. R. H. Sullivan

SPECIFICATION & BIDDING PROCEDURES

QUESTION / ISSUE	SHOULD IT BE PERMITTED	SHOULD IT BE REQUIRED	IS IT ENCOURAGED OR DISCOURAGED	DOES IT OR WOULD IT REDUCE PROJECT DELAYS	BY WHAT PERCENT	DOES IT OR WOULD IT INCREASE PROJECT DELAYS	BY WHAT PERCENT	REMAR
BID SHOPPING (POST CONTRACT AWARD)	☒	☒	Neither	No effect		No effect		Practice [illegible] this is done [illegible] the time.
PREQUALIFICATION OF MAJOR EQUIPMENT PRE BID ADVERTIZEMENT)	Yes		Neither	No effect		No effect		Better price [illegible]
EQUIREMENT TO NAME AJOR SUBS & EQPMT. UPPLIERS IN BID SUBMISSION ONE ONLY PER EACH ITEM)	NO		Discourage	No effect		No effect.		[illegible]
OTHER (SPECIFY IF POSSIBLE)								Contractor would [illegible]

RECOMMENDED CHANGES TO	
LEGISLATION	
EPA REGULATIONS	No New Regulations Required
EPA GUIDANCE (PRM 75-5)	Continue with regulation as agreed
OTHER	State + have a Contractor pre- Qualification procedure. Sub-contractors included.

Report of the
ACEC-WWEMA-AGC Subcommittee on
Prequalification of Equipment
October 5, 1977

PREQUALIFICATION OF EQUIPMENT FOR WASTEWATER TREATMENT FACILITIES

The objectives of the Federal Water Pollution Control Act are in jeopardy because of the price-dominated marketing climate that has been prompted by EPA regulations covering purchase of equipment for wastewater treatment plants. Because of poor equipment, some plants do not function as designed. Once the equipment has been delivered, there is little incentive for the manufacturer to assist in making it work.

Since initial cost is the dominant factor in determining the equipment that will be purchased for the next project, there is little reason for an equipment manufacturer to provide either design assistance or operation and maintenance support. This assistance is essential both during the design of the facilities and when the plant is placed in operation.

From the Contractor's viewpoint, the inability to determine whether an equipment manufacturer's offering will meet the specifications is a serious shortcoming. Contractors must evaluate a multitude of proposals in a very short period. In addition, many Contractors do not have a staff that is technically qualified to evaluate the equipment manufacturer's offering to determine whether it is equivalent to the equipment required by the specifications.

From the Owner's view, it is important to obtain high-quality equipment that will perform the function required for many years in the future. Minimum maintenance and long life are two characteristics that are particularly difficult to obtain and evaluate when first cost is the dominant selection factor. Life cycle costs and energy consumption must be evaluated as well as first cost.

From the Engineer's viewpoint, the review and evaluation of equipment must be performed at some stage in the project. If a prequalification approach is used, the Engineer's evaluation is performed early and the Engineer can be sure that equipment purchased meets the criteria established for the project. However, when prequalification is employed, additional engineering effort will be required to evaluate multiple proposals of Equipment Manufacturers, which must be reflected in the Consulting Engineer's fee structure.

From an Equipment Manufacturer's and the Contractor's viewpoint, the ability to obtain an advance determination of whether equipment is acceptable eliminates an element of uncertainty. Prequalification provides an opportunity for the equipment manufacturer to have his product thoroughly evaluated without the pressure to award a contract. An Equipment Manufacturer who failed to submit his equipment for evaluation during prequalification would be precluded from consideration at the time a contract was awarded.

(Over)

Prequalification should be completed early enough in the project so that designs can be tailored to the requirements of equipment that is considered acceptable by the Engineer. It should be possible to prequalify equipment manufacturers on the basis of description that describes in a general fashion the types of equipment and processes that will be required.

When final project specifications are prepared, the Engineer must list those items of equipment that have prequalified and will be considered acceptable.

The call for submission of prequalification data should be advertised in the same manner as is required for advertisement of the project with a cut-off fixed for submission of prequalification data.

If EPA needs documentation that the Engineer has considered the equipment of all manufacturers who respond to the advertisement for prequalification, a statement will be submitted with the drawings and specifications listing all manufacturers who respond and indicating those whose products have been included.

Prequalification of major items of equipment can provide significant improvement in the quality of equipment and ability of treatment plants to function as designed while retaining the competition that is mandated by PL 92-500.

The following steps are proposed for prequalification:

- Prequalification documents are prepared by Engineer early in Step 2.
- Prequalification documents reviewed by Owner, State, and EPA.
- Advertisement of Prequalification.
- Review by Engineer of prequalification data and determination of acceptability of the equipment of all manufacturers who respond to advertisement.
- Engineer required to include at least two acceptable sources for each major item of equipment, except where a single source is selected under EPA's PRM 75-5.
- Project drawings and specifications prepared, taking into account all acceptable sources.
- Final specifications list names of Equipment Manufacturers who have prequalified.
- Final drawings and specifications reviewed by Owner, State, and EPA.
- Construction contract advertised.
- Bidding Contractor selects equipment from one of prequalified sources.
- Contract awarded to lowest qualified bidder.

ADVERTISEMENT FOR EQUIPMENT QUALIFICATION

COUNTY OF RICHMOND
BOX 594
ROCKINGHAM, N. C. 28379

Design, operational and manufacturing SPECIFICATIONS for major equipment for the construction of WASTEWATER FACILITIES consisting of the following:

A. Regional Pumping Station of 1.0 MGD Capacity.

B. Wastewater Treatment Plant (1.2 MGD) with following units:

  1. Two Aeration Basins of 600,000 gallons capacity each with floating aerators.

  2. Two Clarifiers complete with necessary mechanisms.

  3. Sludge Drying Beds.

  4. Reaeration Basin with floating aerator.

  5. Final Settling Pond of 1,200,000 gallons capacity.

  6. Chlorine Contact Chamber with gas chlorination facilities and mixing.

Equipment qualifications will be received by County of Richmond, through their Consulting Engineers for above project, Moore, Gardner & Associates, Inc. of Asheboro, N. C., until the close of business on October 31, 1977, then analyzed, reviewed and evaluated as to cost effectiveness for inclusion in construction of wastewater facilities project for County of Richmond.

The owner, through their engineers, will prepare a listing of acceptable equipment for use in this project, said listing to become a part of the bid documents.

Preliminary design data and detailed information on this project may be examined, reviewed and discussed with the Consulting Engineer, Moore, Gardner & Associates, Inc., 110 West Walker Avenue, Asheboro, N. C. 27203 (Telephone: 919/625-6111).

NON-DISCRIMINATION IN EMPLOYMENT:

Potential suppliers of equipment to be incorporated on this work will be required to comply with the provisions of the President's Executive Order No. 11375, the provisions of Executive Order No. 11246, Title VI of the Civil Rights Act of 1964 (Davis-Bacon Act), the Anti-Kickback Act, the Contract Work Hours Standard Act, and-or the provisions of any previous Executive Orders dealing with non-discrimination in federally assisted construction contracts (11114 or 10925).

Potential suppliers must certify that they do not and will not, maintain or provide for their employees any facilities that are segregated on a basis of race, color, creed or national origin.

The Board of Commissioners reserve the right to require only that equipment which will, in their judgement, best secure the efficient and most cost effective operation of proposed wasteWater facilities.

NICHOLAS W. DOCKERY
COUNTY ENGINEER
COUNTY OF RICHMOND
NORTH CAROLINA

ENGINEERS:
MOORE, GARDNER & ASSOCIATES, INC.
CONSULTING ENGINEERS
ASHEBORO, NORTH CAROLINA 27203

PREQUALIFICATION OF EQUIPMENT

Prequalification data for equipment to be considered for a complete-mix activated sludge wastewater treatment plant at Fort Mudge, Texas will be received by ABC Consulting Engineers, 2000 Old Town Road, Big City, Arkansas, until Feb 28, 1984.

The proposed treatment plant includes a raw wastewater pumping station, grit removal, primary sedimentation, aeration basin, final sedimentation, aerobic sludge digestion, subsurface sludge injection, and chemical feeding facilities for lime, alum, ferrous sulfate, and chlorine.

The major items of equipment contemplated for this project include:

- Raw Wastewater Pumps
- Cable-Operated Screens
- Grit Removal Equipment
- Circular Sludge Collecting Equipment
- Surface Aeration Equipment
- Sludge Injection Equipment
- Chemical Feeding Equipment

Equipment Manufacturers are warned that major items of equipment will be evaluated on the basis of prequalification data. The equipment of a manufacturer who fails to submit data during the prequalification period may be excluded when the project is bid.

The Project Engineer for this project is I. M. Fairguy, telephone (501)999-1111.

ABC Consulting Engineers

RECOMMENDATION REGARDING EPA PG-19A

It is believed that a proper prequalification procedure, including a legal advertisement for the submittal of qualifications, with regard to wastewater treatment equipment will fulfill the intent of the requirements set forth by EPA in PG-19A for "free and open competition".

The U. S. Government does, in fact, legally advertise (with cut-off dates for submittals) for projects, goods and services and apparently considers that procedure to provide for "free and open competition" in its normal course of procurement. Prequalification of equipment by way of legal advertising with a cut-off date for submittals should be considered in no different light.

On Page 2 of PG-19A, the EPA establishes the authority of the AE by stating that the AE is "the most qualified to determine" when discussing acceptability of an "or equal" product. It should follow then, that, the AE should be able and permitted to publish a listing, through a proper prequalification procedure, for equipment which would be acceptable for installation in a project and still fulfill the intent of PG-19A.

It is recommended, therefore, that EPA revise the wording of PG-19A to permit use of an agreed-upon prequalification procedure for wastewater treatment equipment. The requirement for inclusion of "the criteria he will use in evaluating" (Page 2 of PG-19A) can be retained in the prequalification documents. It is further recommended that the term "or equal" not be imposed as a requirement in the bid specifications for the project when a proper prequalification procedure has been employed.